No. 85-628

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1985

KENNETH P. BIPPAS, et al.,

Petitioners

v.

LOCAL 100 OF THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the pendency of an unfair labor practice proceeding before the National Labor Relations Board toll the running of the six month statute of limitations held applicable to a "hybrid" §301/ fair representation suit in DelCostello v. International Brotherhood of Teamsters?

2. Should the Court's decision in DelCostello v. International Brotherhood of Teamsters, establishing a six month statute of limitations in a "hybrid" § 301/ fair representation case, be applied retroactively?

3. Did the District Court err in determining on a mixed record that, drawing all inferences in a light most favorable to Petitioners, that there was no genuine issue of material fact as to when the Petitioners' cause of action arose?

PARTIES TO THE PROCEEDING BELOW

Petitioners (Appellants in the Court of Appeals) include:

KENNETH BIPPUS; WALTER BOLTON; EARL BORN; LEROY BOWERS; ROBERT BOWLING; DONALD BROWNING; MICHAEL BROERMAN; WILLIAM CAGEL; WAYNE CHEEK; JERRY CREWS; ROBERT DUMFORD, JR.; ROBERT DUMFORD, SR.; WENDELL EVERSOLE; REX FOX; EDWARD FRESON; THOMAS GABBARD; ROLAND GIBSON; DAVID GRAU; JESS HARNEY; JAMES HOF; LAWRENCE HUBER; JERRY KINDRED; JOHN KRIEG; LESLIE LONAKER; WAYNE LYKINS; DONALD LYNCH; GERALD MARTIN; JAMES McFARLAND; STEWARD J. MITCHELL; MICHAEL MOLLOY; MICHAEL O'DONNELL; CHARLES PARKER; JOHN PARKER; JOHN PHILLIPS; BILL PIERSON; JIM RACK; TERRY RETTBERG; GENE ROBERTS; JOE RUSSELL; JOE SARGENT; ROBERT SCHIBI; CHARLES SIBCY; EDWARD SMITH; GEORGE TOFT, JR.; ELSWROTH TRADER; CHARLES VEDDERN; CARL WEBBER; RONALD WHEELER; ANDREW WHITAKER; KEITH WILSON; AND EWELL WYATT.

Respondents (Appellees in the Court of Appeals) include:

LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA; CLYDE W. WOEBER; IRVIN T. SCHARFENBERGER; READING CENTRAL MIXED CONCRETE; READING CONCRETE, INC.; JOHN DOE (A CORPORATION); JOHN DOE (A BUSINESS ENTITY OR ENTITIES); JOHN DOE (AN INDIVIDUAL/INDIVIDUALS).

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit in this proceeding.

OPINIONS BELOW

Both the opinion of the District Court for the Southern District of Ohio, and the opinion of the Court of Appeals for the Sixth Circuit are unreported. Copies of these opinions are included in the Appendix to this Petition.

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on July 17, 1985. A copy thereof is included as Appendix A to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS AND RULES

The following are relied upon in the herein Petition:

1. Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185, included as Appendix C.

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5 (f)(1) included as Appendix D.

3. Ohio Revised Code §§2305.07; 2305.09; 2305.10, included as Appendix E.

4. Rule 56(c), Federal Rules of Civil Procedure, included as Appendix F.

STATEMENT OF THE CASE

This is a "hybrid" §301/ fair representation action brought under §301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. Petitioners' employment was terminated by the Respondent employer Reading Central Mixed Concrete, Inc. ("Reading") on December 31, 1980. Petitioners claimed in the Courts below that Respondent Reading Concrete, Inc. (a subsidiary of SDI industries--hereinafter "SDI") is the "alter ego" of Reading and that it is bound by the collective bargaining agreement executed by Reading and Respondent Local 100 of the International Brotherhood of Teamsters, Chauffers Warehouseman and Helpers of America ("Union") in 1979.[1]

[1] The remaining individual Respondents are corporate officials of Reading and SDI who executed the sales agreement on behalf of the corporation.

Reading and SDI entered into a purported sales agreement effective January 2, 1981. Petitioners claim that the terms of the transaction, which disavowed SDI's recognition of their collective bargaining agreement, and their terminations, were in violation of the collective bargaining agreement.

Petitioners claim that the Union violated its duty of fair representation in that it arbitrarily and in bad faith refused to pursue and resolve their timely grievances protesting the Reading/SDI agreement and the consequent termination of their employment.

The District Court, on December 13, 1982, denied a motion for summary judgment of Respondents SDI and Scharferberger on grounds not pertinent to the issues before this Court. On

January 10, 1984, the District Court granted various motions of all Respondents (all treated as motions for summary judgment) solely on the ground that the Petitioners had not brought their cause of action within the six month time period held applicable to §301/ fair representation actions in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983).

The District Court concluded that the statute of limitations began to run when Petitioners "knew or reasonably should have known that a breach of the duty of fair representation had occurred." (App B. at 30a). The court relied on the affidavit and deposition of Donald Browning, the former union

steward for Petitioners, who indicated that the President of the Union, Gairald Kiser, had made numerous statements in January and February of 1981, which the court concluded had commenced the running of the statute of limitations. (Id. at 33a-35a). These statements included remarks in January of 1981 such as the Petitioners were "nothing but a burr under his saddle and that he would be glad when they were gone." The court also relied on statements by Browning in his deposition to the effect that by January, 1981 "as a group [they] decided that [they] needed to go another route," and when asked why, Browning responded "Well, from the statements that was [sic] made from the union."

Petitioners responded to

Respondents' motion with affidavits from Browning and three other Petitioners which indicated that after a very stormy meeting, and in spite of his prior comments, Kiser hired attorney Bruce Pence to represent the Petitioners. The Petitioners indicated that they learned in the first week in June that their appeal to the General Counsel of the Regional Director's refusal to file charges had been denied. Also, in another affidavit, Browning stated that a new business agent, Ken Watson, had been elected in January of 1981 and that Watson indicated that "the grievances filed in January would be taken care of after the legality of the sale to SDI was tested and until then his hands were

tied."

After reviewing all of the above matter the court concluded, "Despite evidence in the record which establishes that Bruce Pence did in fact file unfair labor charges with the NLRB, and pursue those charges through the appeals stage, all of the foregoing shows very conclusively that by late January, 1981 or early February, 1981, the plaintiffs through their representative, Mr. Browning, knew or should have known that the union per union president Gairald Kiser, was not going to act upon their contractual grievances." (Id. at 35a).

After making this determination, the District Court then concluded that the filing and pendency of the NLRB charge did not toll the six-month

statute of limitations. Petitioners' actions were thus dismissed. The United States Court of Appeals for the Sixth Circuit affirmed this decision on July 17, 1985. (App. A at 12a).

JURISDICTIONAL GROUNDS BELOW

Jurisdiction in the District Court for the Southern District, Western Division of Ohio was invoked per 29 U.S.C. § 185 (c), 28 U.S.C. §1331(a) and 28 U.S.C. §1337(a).

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THE PETITIONERS' FILING OF AN UNFAIR LABOR PRACTICE COMPLAINT WITH THE NLRB TOLLED THE STATUTE OF LIMITATIONS

Petitioners submit that the decision of the Court of Appeals should be reviewed because it erred in holding that Petitioners' pursuit of relief before the National Labor Relations Board did not toll the running of the statute of limitations applicable to their case. The decision of the Court of Appeals has decided an important question of federal labor law which Petitioners submit should be decided by

this Court.

The decisions of lower courts denying the tolling effect have relied on this Court's decision in Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) (pursuit of contractual grievance procedure does not toll period for filing Title VII claim) and Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (filing of EEOC charge does not toll period for filing an action under 42 U.S.C. § 1981). The thrust of these cases is that these different avenues of relief are completely independent of each other, and hence there are no reasons why pursuit of one remedy should toll the limitation for another.

The problem with this contention as applied here is that NLRB remedies

and the hybrid §301/ fair representation action are not as independent as it might appear at first blush. The decision of the General Counsel not to file unfair labor practice charges is not directly reviewable by any board or court. Vaca v. Sipes, 386 U.S. 171, 182 (1967).

Where there is an allegation as to the union's breach of its duty of fair representation, an employee may seek through the hybrid §301 action a judicial determination as to whether the employer violated the contract and the union breached its duty of fair representation. A fair reading of Vaca indicates that the hybrid §301/ fair representation action is a necessary means of checking the unbridled

discretion of the General Counsel. Therefore, any sugggestion that the two remedies are independent is fallacious.

The difference with respect to independence of remedies is also illustrated by the comparison of the plight of Petitioners as opposed to the position of a complainant in the Johnson sort of case. A Title VII complainant who is unsuccessful in EEOC proceedings may still attain judicial relief through the filing of a civil action. See 42 U.S.C. §2000e-5 (f)1. In the instant case, an employee in the Petitioner's position is simply out of court as a result of relying on administrative relief before the Board. It would hardly effectuate federal labor policy to force an employee prematurely

into court when the NLRB may, as it could have here, offer complete relief through back pay and reinstatement.

There is, moreover, authority from the Court of Appeals for the Ninth Circuit that the filing of a complaint with the Board does toll the running of the statute of limitations in a "hybrid" §301 suit. The court squarely so held in Retail Clerks v. Hub Pharmacy, Inc., 707 F.2d 1030, 1037 (9th Cir. 1983). While Hub Pharmacy was a pre-DelCostello decision applying California tolling principles, the same court considered application of the tolling principle in Aragon v. Federated Department Stores, Inc., 750 F.2d 1447 (9th Cir. 1983), a post-DelCostello case. In that decision the court, again apparently considering state tolling

principles, declined to hold that the statute was tolled from running on the facts of the case, i.e., the plaintiff brought a claim for and prosecuted an appeal regarding unemployment compensation. The court noted that "[t]hese actions do not, however, rise to the level of promoting national labor-management policies in the same way that pursuing claims with the NLRB does." Aragon, 750 F.2d at 1454. Therefore, the approach of the Ninth Circuit appears to vary from that of the Sixth Circuit in the instant case as well as the Fourth Circuit in Kolomick v. Steelworkers, 762 F.2d 354 (4th Cir. 1985) wherein the same result was reached. Due to the importance of this question of federal labor law and an

indication of a split in the Circuits, petitioners respectfully submit that this Court should review their case and hold that the running of the statute of limitations to their cause of action, was tolled by the pendency of their claim before the Board.

II. DELCOSTELLO SHOULD NOT BE APPLIED RETROACTIVELY TO BAR THE PETITIONERS' CLAIM

There has been a great deal of variance among the Courts of Appeals as to the proper application of the DelCostello decision to cases arising prior to the date of the decision, June 8, 1983. Some of the cases have also dealt with the issue of the impact of United Parcel Service, Inc. v. Mitchell 451 U.S. 56 (1981), a case in which only the employer and not the union involved had sought certiorari. In Mitchell, the employee's grievance had been submitted to arbitration. This Court held that the statute of limitations for vacating an arbitration award applied to the employee's cause of action against the employer.

A sampling of the cases across the Circuits indicates the confusion in the present state of the law. The Ninth Circuit in a series of cases has concluded that neither DelCostello nor Mitchell are to be given retroactive effect. The development of the law in the Circuit is summarized in Barina v. Gulf Trading & Transportation Co., 726 F.2d 560 (9th Cir. 1983), cert. denied, 104 S.Ct. 1599 (1984). Under the court's analysis in Barina, the Petitioners' action in the instant case would not be barred even assuming that the district court's conclusion that Petitioners' claim arose in January-February, 1981 stands and this Court determines there is no tolling rendered by the NLRB proceeding. The

Barina plaintiff's claim arose prior to Mitchell [2] and DelCostello. Under the reasoning of the Barina decision the applicable statute of limitations is the most applicable state limitations provision per UAW v. Hoosier Cardinal Corp., 383 U.S. 696, (1966).

At the time in question, counsel in Ohio would have determined that the requisite statute of limitations for the hybrid action would be the same for the union and employer, Gallagher v. Chrysler Corporation, 613 F.2d 167, 169 (6th Cir. 1980), cert. denied, 449 U.S. 841 (1980), and it would be based on a statute of limitations for a tort action,

[2] Petitioners' case and the Barina case are parallel in that the causes of action arose prior to Mitchell, but the complaints were filed after the date of the Mitchell decision, April 20, 1981.

Id., or possibly O.R.C. §2305.07, the six year Ohio statute of limitations for actions for liabilities created by statute. Newton v. International Union of Electrical Workers, 507 F. Supp. 439 (S.D. Ohio 1980) aff'd, 684 F.2d 421 (1982). Review of the relevant Ohio statutes of limitations for tort actions would have indicated a period of four or perhaps two years. O.R.C. §§2305.09; 2305.10. Under this analysis, the Petitioners' cause of action is not barred, since on any version of the facts it was brought within less than one year.

Other Circuits have at times simply applied DelCostello retroactively, e.g., Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2d Cir. 1984),

cert. denied, 105 S.Ct. 512 (1984); Smith v. General Motors Corp., 747 F.2d 372 (6th Cir. 1984). The Fourth Circuit, after application of the guidelines in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), declined to give it retroactive effect in Zemonick v. Consolidated Coal Co., 119 LRRM 2606 (4th Cir. 1985). In other instances, the courts have applied Chevron and determined there should be retroactivity, e.g., Perez v. Dana Corp., 718 F.2d 581 (3rd Cir. 1983); Graves v. Smith Transfer Corp., 736 F.2d 819 (1st Cir. 1984)

The confusing state of the law is indicated by the fact that on occasions decisions from the same circuit have gone the opposite way. Compare Murray v. Branch Motor Express, 723 F.2d

1146 (4th Cir. 1983) with Zemonick and Byrne v. Buffalo Creek R.R., 119 LRRM 3029 (2d Cir. 1985) with Welyczko. See also Smith v. General Motors, 747 F.2d at 375 n. 7.

Application of the Chevron factors to Petitioners' case requires a determination that it should not be barred by the supervening DelCostello decision.[3] Surely these cases were a clear break from past precedents.

[3] Arguments for the non-retroactivity of DelCostello would apply a fortiori to Mitchell. Moreover, in the period between Mitchell and DelCostello there was a good deal of confusion as to the applicability of Mitchell to a case such as Petitioners' in which the employee's grievance had not gone to arbitration. See Assad v. Mount Sinai Hospital, 703 F.2d 36 (2d Cir. 1982), vacated, 104 S.Ct. 54 (1983), on remand, 725 F.2d 837 (1984).

Counsel for years had relied on the rule of Hoosier Cardinal and the many precedents applying lengthy state statutes of limitations to various §301 actions. The policies effectuated by Congress in enacting legislation affording the §301 remedy would clearly not be served by barring these Petitioners from court as a result of a procedural limitation arising some one and a half years after the filing of their complaint. Finally, retroactive application of the limitation would be extremely inequitable in this case. Petitioners had survived an initial motion for summary judgment in December of 1982. They continued their costly litigation only to be hit with a new motion by Respondents filed after the

DelCostello decision was rendered.

Petitioners respectfully submit that the splits and confusion in the federal courts as to the retroactivity issue calls for a decision by this Court and that the application of the proper principles of law requires a determination that their cause of action is not time-barred. It is unconscionable to apply any statute of limitations retroactively in that, it would require all plaintiffs to predict the outcome of future court decisions.

III THE DISTRICT COURT ERRED IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

It is axiomatic that the court, when considering a motion for summary judgment, must draw all inferences in a light most favorable to a party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). This Court has also said that Rule 56(c), Fed. R. Civ. P. authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is and where no genuine issue remains for trial for the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Poller v. Columbia Broadcasting System, 368 U.S. 464, 467 (1962) (citation omitted).

In this case the District Court examined a sparse and contradictory record and, Petitioners respectfully submit, failed to adhere to the proper legal standard in granting the Respondents' motion. It did appear from the record that Union president Kiser made hostile remarks in connection with the Petitioners in late January, early February, 1981. These are reviewed in the District Court's opinion (App. B. at 33a-34a).

Browning's affidavit confirms hostility from Kiser but also indicates that Petitioners felt they were "on hold" due to more receptive treatment by business agent Ken Watson:

> 14. President Kiser told me in January 1981, in the union hall, that the

Reading employees were "nothing but a burr under his saddle" and "he'll be glad when we are all gone." Kiser told me on another occasion that he was going to keep out of Reading's business and he would do nothing concerning Reading's grievances and he would not spend any more union money on our grievances. He was referring to both the old grievances and the grievances we had filed protesting the sale and loss of our seniority rights.

15. On several occasions, Kiser cursed at myself and other Reading employees and used obscenities and was generally hostile in his tone of voice towards us and our grievances. Once he tried to provoke a fist fight with me and said "why don't you hit me?"

16. Ken Watson took over as business agent for Local 100 after January 1, 1981, and told me that the grievances filed in January would be taken care of after the legality of the sale to SDI was tested and resolved and until then, his hands were tied and he was waiting on Kiser. Watson said he

> could do nothing regarding the grievances until he got the O.K. from Kiser.
>
> 17. We had never been told as to what happened to the grievances by Local 100. I had asked Watson and Kiser on many, many occasions concerning the disposition of our grievances and we never got a final answer and we never were told they were dropped. In my opinion, Kiser's personal and political hostility was the reason why our grievances were not processed.

This "mixed message" theme is developed further in another affidvait from Browning and three other Petitioners. All four affidavits are identical and state:

> 2. Bruce Pence was handling our case in the early part of January, 1981, but Gairald Kiser removed him.
>
> 3. At our insistence, during a very stormy meeting, in late January, Kiser reluctantly reinstated Mr. Pence as our attorney.

4. Mr. Pence met with us and recommended that we file unfair labor practice charges against Reading and SDI.

5. On February 5, 1981, he filed charges in our behalf with the Labor Board.

6. The Regional Director refused to issue a Complaint and he appealed the decision to the General Counsel in Washington.

7. Sometime during the first week of June, when it appeared in the paper, I learned that our appeal had been denied.

8. It was at that time I learned Local 100 would not process our original grievances nor assist us any further. I joined the other Plaintiff's and hired an attorney.

9. When we were laid off, we were told to apply for jobs with the "new" company and the hiring process continued for several months.

Therefore, it is apparent that

during this confusing period Kiser was at times hostile to the Petitioners' concerns but actually arranged for an attorney to represent them. There appeared to be hope given this, and also the fact that communications from Watson, at least, indicated that relief could ultimately be attained through the grievance procedure.

The District Court discounted the assertions of the Petitioners that it was in June that they first learned that Local 100 would not process their original grievances nor assist them further by stating that these remarks fly in the face of Browning's statements. (App B. at 37a). This indicates that the trial court resolved an issue of credibility. It is well

settled that issues of credibility are in the province of the jury and are not to be disposed of in a summary judgment motion. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944).

Obviously, the District Court did not draw all inferences in a light most favorable to Petitioners. There was ample evidence from which it should have been inferred that Petitioners did not know nor should have known of the breach of the Union's duty until June of 1981.

Finally, the fact that the Union supplied Petitioners with counsel indicates that they were justified in believing they were receiving fair representation prior to June of 1981. Removal of the services of counsel can

be a breach of the duty of fair representation on the part of a Union. Del Casal v. Eastern Airlines, Inc., 465 F.Supp. 1254, 1258-59 (S.D. Fla. 1979), aff'd 634 F.2d 295, cert. denied, 454 U.S. 892 (1981). See also Seymour v. Olin Corporation, 666 F.2d 202, 206 (5th Cir. 1982). Logic and common sense dictate that it is unfair to infer that Petitioners should have known that the Union was breaching its duty toward them at the very time it supplied this benefit.

As a result of scant and conflicting testimony, the Petitioners have been procedurally barred from receiving their day in court.

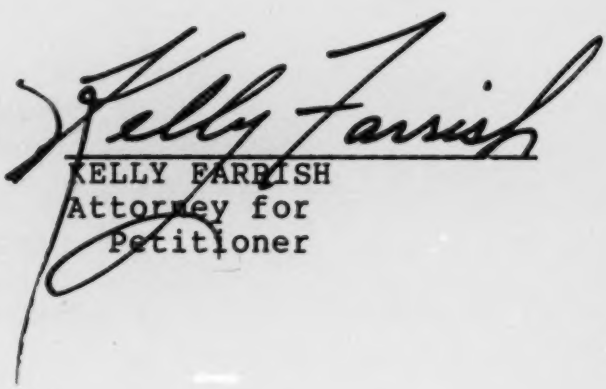
Petitioners respectfully submit that this Court in the exercise of its

superintendence over the federal courts should grant review to correct this error.

CONCLUSION

For these reasons it is respectfully submitted that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



KELLY FARRISH
Attorney for
Petitioner

APPENDIX A

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH BIPPUS; WALTER BOLTON; EARL BORN; LEROY BOWERS; ROBERT BOWLING; DONALD BROWNING; MICHAEL BROERMAN; WILLIAM CAGEL; WAYNE CHEEK; JERRY CREWS; ROBERT DUMFORD, JR.; ROBERT DUMFORD, SR.; WENDELL EVERSOLE; REX FOX; EDWARD FRESON; THOMAS GABBARD; ROLAND GIBSON; DAVID GRAU; JESS HARNEY; JAMES HOF; LAWRENCE HUBER; JERRY KINDRED; JOHN KRIEG; LESLIE LONAKER; WAYNE LYKINS; DONALD LYNCH; GERALD MARTIN; JAMES McFARLAND; STEWARD J. MITCHELL; MICHAEL MOLLOY; MICHAEL O'DONNELL; CHARLES PARKER; JOHN PARKER; JOHN PHILLIPS; BILL PIERSON; JIM RACK; TERRY RETTBERG;	:	NO: 84-31222 O R D E R

GENE ROBERTS; JOE RUSSELL; JOE SARGENT; ROBERT SCHIBI; CHARLES SIBCY; EDWARD SMITH; GEORGE TOFT, JR.; ELSWROTH TRADER; CHARLES VEDDERN; CARL WEBBER; RONALD WHEELER; ANDREW WHITAKER; KEITH WILSON; AND EWELL WYATT,

Plaintiffs-Appellants,

v.

LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA; CLYDE W. WOEBER; IRVIN T. SCHARFENBERGER; READING CENTRAL MIXED CONCRETE; READING CONCRETE, INC.; JOHN DOE (A CORPORATION); JOHN DOE (A BUSINESS ENTITY OR ENTITIES);

JOHN DOE (AN INDIVIDUALLY/ INDIVIDUALS). :

Defendant-Appellees, :

BEFORE: MARTIN, WELLFORD and MILBURN, Circuit Judges

These Ohio plaintiffs move this Court to stay its proceedings and remand this cause to the district court for the limited purpose of allowing the district court to hold an evidentiary hearing on their rule 60(b) motion to vacate the district court's judgment so plaintiffs can amend their complaint to allege a new cause of action. The plaintiffs are appealing from a district court judgment dismissing their suit filed under §301 of the Labor Management Relations Act, 29 U.S.C. §185, for being untimely.

Charging their former company with breach of contract and their union with breach of its duty of fair representation, plaintiffs alleged that they were illegally discharged by their employer, Reading Concrete, when it sold its assets to the defendants, SDI Reading Concrete, Inc. and Irvin T. Scharfenberger (collectively referred to as "SDI").

Ultimately, the district court decided that plaintiffs' suit was filed beyond the six month time period applicable to hybrid §301 suits. DelCostello v. Teamsters, 462 U.S. 151 (1983). For this ruling, the court chiefly relied on the deposition and affidavit of a Mr. Donald Browning, who is a plaintiff in this suit and the former union steward for the Reading

Concrete drivers. The district court concluded from a review of Mr. Browning's testimony that the plaintiffs certainly knew or should have known by February of 1981 that the union was ignoring their grievances filed on January 12 and 13, 1981, and that the union was acting with hostility and in contravention of the desires of these plaintiffs. With the complaint having been filed more than six months later on November 16, 1981, the court concluded that the suit was late and that the time had not otherwise been tolled while the plaintiffs sought relief through an appellate stage with the NLRB.

On appeal, the plaintiffs complain that if the district court had liberally construed the summary judgment

proceedings in their favor, then it would have concluded that the plaintiffs could not have reasonably known that the union had breached their duty of fair representation until the first week of June when they learned that they had lost their appeal before the NLRB. Plaintiffs further contend that they received mixed signals from several union representatives which reasonably led them to believe that they were receiving fair representation by the union up until the first week in June of 1981.

Upon consideration of all of the arguments made by the parties in their briefs and papers filed in this cause, this Court concludes that the district court's judgment of dismissal should be affirmed and that the plaintiffs' motion

to stay and remand should be denied. The district court properly concluded that the plaintiffs' suit was untimely because their cause of action had accrued more than six months prior to the filing of the suit when they knew or should have known in late January or early February that their discharge and loss of rights would not be fairly challenged by their union. Shapiro v. Cook United, Inc., ____ F.2d ____, slip op. 83-3087 (6th Cir. May 17, 1985) (per curiam). A review of the testimony given by the plaintiffs' former union steward as submitted in his deposition and his affidavit amply reveals an open hostility and unwillingness on the part of the union president in late January and early February of 1981 to have anything to do with the plaintiffs'

grievances. This evidence of open hostility toward the plaintiffs was not assuaged or contradicted by other remarks made by the union's business agent and by the plaintiffs' false hope of success before the NLRB. Although the business agent told Mr. Browning that the union would address the grievances after the legality of the sale was resolved, he also said that his hands were tied and that he could do nothing for the plaintiffs unless he received authorization from the union president. Plaintiffs certainly could not reasonably have invested any hope of fair representation on the remarks made by the business agent, however, because the union president had already unequivocally expressed his opposition to the plaintiffs' grievances. It was

also not reasonable for the plaintiffs to ignore this expression of hostile opposition and to believe that the union had not breached their duty of fair representation because it had reluctantly allowed outside counsel to file a charge of unfair labor practice with the NLRB in behalf of the plaintiffs. The plaintiffs can also not demonstrate reasonable expectation of fair union representation under these circumstances by further relying on cases which supposedly hold that withdrawl of union legal representation during the pursuit of grievance procedures can amount to unfair representation. It is, nontheless, well-settled that pursuit of relief with the NLRB does not toll the time to file a hybrid §301 suit. Aarsvold v.

Greyhound Lines, Inc., 724 F.2d 72, 73 (8th Cir. 1983) (per curiam). cert. denied, _____U.S._____, 104 S.Ct. 3538 (1984); Estades v. Harry M. Stevens, Inc., 593 F.Supp. 778, 782 (D. P.R. 1984); Bey v. Williams, 590 F.Supp. 1150, 1154 (W.D. Pa. 1984); Boyd v. Teamsters Local, 553, 589 F.Supp. 794, 796 (S.D. N.Y. 1984).

Under these circumstances, it is clear that the plaintiffs' suit was untimely because their cause of action had accrued more than six months prior to the filing of their suit on November 16, 1981, when they knew or reasonably should have known in late January or early February of 1981 that the union would never fairly present their grievances to their previous employer.

Finally, it is concluded that

plaintiffs' motion to stay and remand should be denied for several reasons. It is initially observed that a dismissal of a suit for being barred by a statute of limitations may be a judgment on the merits to which res judicata can attach. Nathan v. Rown, 651 F.2d 1223, 1226 (6th Cir. 1981); Cemer v. Marathon Oil Co., 583 F.2d 831, 832 (6th Cir. 1978) (per curiam). The plaintiffs may, however, present their same equitable arguments which are asserted to support their Rule 60(b) motion to support an argument, to be made in the district court having jurisdiction over their second suit, whether invocation of res judicata would contravene an overriding public policy or result in manifest injustice. See Westwood Chemical Co., Inc. v. Kulick,

656 F.2d 1224, 1228-31 (6th Cir. 1981), and cases cited therein. We deny the plaintiffs' motion to stay and remand to avoid the anomaly of having the parties' dispute be pending before an appellate court and two district court judges simultaneously.

For these reasons, this panel unanimously agrees that oral argument is not necessary in this appeal. Rule 34(a), Federal Rules of Appellate Procedure. The plaintiffs' motion is, accordingly, denied and the district court's judgment is hereby affirmed pursuant to Rule 9(d)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF
THE COURT

CLERK

APPENDIX B.

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KENNETH P. BIPPUS, et al.,	:	No. C-1-81-906
Plaintiffs	:	OPINION AND ORDER GRANTING MOTION OF DEFENDANTS SDI READING CONCRETE, INC. AND IRVIN T. SCHARFENBERGER FOR SUMMARY JUDGMENT, GRANTING MOTION OF DEFENDANTS READING CENTRAL MIXED CONCRETE, INC. AND CLYDE W. WOEBER FOR SUMMARY JUDGMENT, AND GRANTING MOTION TO DISMISS OF DEFENDANT TRUCK DRIVERS,
v.	:	
LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.	:	
Defendants.	:	

: CHAUFFEURS AND HELPERS
: LOCAL NO. 100

HOGAN, S.J.

INTRODUCTION

This matter came on for consideration of defendants SDI Reading Concrete, Inc.'s (SDI) and Irvin T. Scharfenberger's second motion for summary judgment (doc. 33), the first motion for summary judgment submitted by those defendants having been denied by this Court approximately one year ago (doc. 25). In addition to the aforementioned second motion for summary judgment, defendants Reading Central Mixed Concrete, Inc. (Reading) and Clyde W. Woeber have filed a separate motion for summary judgment (doc. 36) and defendant Truck Drivers, Chauffeurs and

Helpers Local Union No. 100 has filed a motion to dismiss (doc. 38). This last motion will be treated as a motion for summary judgment. Plaintiffs have filed a memorandum in opposition to defendants SDI's and Irvin Scharfenberger's second motion for summary judgment (doc. 37). By letter of November 29, 1983, plaintiffs' counsel asks this Court to consider the three separate defense motions collectively, maintaining that all three raise the same basic issues. Plaintiff's counsel states that plaintiffs do not intend to file a separate memorandum in opposition to defendant Reading's and defendant Woeber's motion for summary judgment or to Local 100's motion to dismiss. In this regard, plaintiffs' counsel asks

this Court to consider the plaintiffs' memorandum in opposition to the motion of defendants SDI and Scharfenberger for summary judgment as being applicable to all of the aforementioned defense motions. The Court has considered plaintiffs' memorandum in accord with this request. Finally, consideration has also been given to defendant SDI's and defendant Scharfenberger's reply memorandum in support of their second motion for summary judgment (doc. 39).

FACTUAL BACKGROUND

As previously stated by this Court (Doc. 25), this case involves various federal and common law causes of action arising out of a labor dispute. The labor dispute was prompted by defendant Woeber's sale of Reading in January,

1981. Prior to the sale, plaintiffs were employees of Reading.

The pertinent facts relating to the labor dispute need not be further set forth in great detail, as they have previously been noted (see again Doc. 25). In essence, plaintiffs claim that their jobs were protected by a provision, Article 16, found in a collective bargaining agreement then existing (prior to defendant Woeber's sale of Reading) between defendant Reading and defendant Local 100. Plaintiffs maintain that pursuant to Article 16 of the Reading/Local 100 agreement, any purchaser of Reading was bound to assume the entire collective

bargaining agreement. Plaintiffs allege that defendants Woeber and Reading violated that agreement by entering into a purchase agreement which did not require such an assumption. Plaintiffs allege further that Local 100 violated its duty of fair representation by failing to enforce the Reading labor agreement. Finally, as stated by plaintiffs' counsel in the memorandum in opposition to the defense motions, plaintiffs' claim for relief against defendants SDI and Scharfenberger is based upon the theory that SDI is the "alter ego" of Reading, and upon the claim that defendants SDI and Scharfenberger conspired with defendant Reading to tortiously interfere with the Reading/Local 100 collective bargaining agreement.

PROCEDURAL BACKGROUND

Preliminarily, it should be observed that the original motion for summary judgment of defendants SDI and Scharfenberger was based upon three principle grounds: (1) a claim that as a matter of law, SDI should not be viewed as being the alter ego of Reading; (2) a claim that if plaintiff prevails on his claims against defendants SDI and Scharfenberger, an impermissible conflict with a NLRB approved settlement would arise; and (3) a claim that plaintiffs failed to timely exhaust available contractual grievance procedures prior to filing this action. (See generally doc. 25, p.4). In denying the original motion for summary judgment this Court held, in response to

the aforementioned claims, that: (1) a determination of whether a factual issue exists as to SDI's alter ego status, along with a determination of how much deference should be afforded the investigative findings of the NLRB, was not appropriate prior to the completion of discovery; (2) that because a conflict with the NLRB settlement could only occur from the nature of the relief granted, if any, concern with a possible conflict was premature; and (3) that plaintiffs would have to be granted the opportunity to demonstrate, via discovery, that a factual issue existed regarding the attempt to timely grieve the disputed discharges. In thus denying the original motion for summary

judgment, we closed by stating that defendants were nonetheless free to renew their motion upon completion of discovery (doc. 25, p.8).

The foregoing review is necessary as plaintiffs' opposition to the various defense motions now presented is based in part upon the claim that discovery has not in fact yet been completed. From this, the plaintiffs argue that defendants SDI and Scharfenberger have violated this Court's prior Opinion and Order by prematurely renewing their motion.

Arguably, there may be a question as to whether the aforementioned language directed to defendants SDI and Scharfenberger should be directed as well to the other defendants in this case. Resolution of that question,

however, is unnecessary for the reason that the present motions of the various defendants are based largely upon a question involving the statute of limitations, a question which, of course, was not raised earlier. 1/ We find no reason why this new issue

1/ It should be noted that defendants SDI and Scharfenberger have in fact renewed their claim that defendants failed to timely exhaust available contractual grievance procedures prior to bringing this action. In this regard, defendants SDI and Scharfenberger claim that further discovery relating to this issue is unnecessary (doc. 39, p.9). Plaintiffs' counsel, of course, disagrees (doc. 37, p.7). Although the defendants' position on this point appears to be solidly supported by the affidavits filed herein, we need not now decide this particular question, since disposition of this case is possible on statute of limitations grounds alone.

may not now be raised and considered. As set forth in the pages which follow, careful consideration leads this Court to conclucde that Plaintiffs' action is indeed barred by the applicable statute of limitations. Judgment will thus be entered in favor of all defendants, as set forth more fully later herein.

PLAINTIFFS' ACTION IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

The defendants maintain that the six month statute of limitations set forth in Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b), is controlling in this action pursuant to the Supreme Court's recent

decision in DelCostello v. International Brotherhood of Teamsters, ____ U.S. ___, 103 S.Ct. 2281, 113 L.R.R.M. 2737 (1983).

It is important to note, first, that DelCostello did not involve a straightforward breach of contract suit bought under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, 103 S.Ct. at 2289. Rather, in DelCostello, as here, suit was brought against both the employer and against the union. As stated in DelCostello, the action against the employer is based upon § 301, for breach of a collective bargaining agreement. The action against the union, by contrast, is one for breach of the union's duty of fair representation, a duty "which is implied under the scheme of the National Labor Relations Act." Id. at 2290. "The suit is thus not a

straightforward breach of contract suit under § 301, . . . but a hybrid § 301/fair representation claim, amounting to 'a direct challenge to the private settlement of disputes under [the collective-bargaining agreement].'" Id. at 2291. In such a situation, the Court reasoned that the "balance of interests" involved would be best served by the application of the NLRA's six month statute of limitations.

Based on the foregoing, there can be no question that the six month NLRA limitation period applies to a hybrid § 301/fair representation suit such as the one at bar. The plaintiff does not contest this reading of DelCostello. Just as importantly, the plaintiffs expressly agree with the defendants'

contention that DelCostello should be given retroactive effect (doc. 37, p.6). This Court concurs in the parties' retroactivity assessment, finding ample case authority to support such a position. See e.g., Perez v. Dana Corporation, Parrish Frame Division, No. 82-1547, slip op. (3d Cir., Sept. 28, 1983); see also, the decisions of Judge Rice of this District in Dowty v. Pioneer Rural Electric Cooperative, Inc., No. C-1-3-82-005 (S.D. Ohio, Aug. 26, 1983), appeal docketed, No. 83-3621 (6th Cir., Sept. 22, 1983) and McPeek v. Dayton Forging and Heat Treating Co., No. C-1-3-83-084 (S.D. Ohio, Aug. 26, 1983); cf. Foltz v. Teamsters Local Union 414, Civil No. 83-63 (N.D. Ind., Aug. 8, 1983).

Having determined that DelCostello's six month statute of limitations holding applies, two key questions remain open for consideration. First, at what point does the limitations period begin to run? Second, are there any circumstances under which the limitations period can be tolled?

With respect to the first of these questions, Judge Rice, in three well-reasoned opinions, has recently held that a hybrid § 301/fair representation action accrues no later than the time plaintiffs "knew or reasonably should have known that a breach of the duty of fair representation had occurred, even if some possibility of nonjudicial

enforcement remained." Adkins v. General Motors Corp., 113 LRRM 2147, 2151 (S.D. Ohio 1983) (emphasis added); see again Dowty, supra; McPeek, supra. We note also that Judge Porter of this District came to this same conclusion in a case decided prior to DelCostello. See Bowman v. Cincinnati Mine Machinery Co., No. C-1-82-1251 (S.D. Ohio, May 4, 1983). Then, too, the Seventh Circuit in Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983) recently reached this same result. After considering the impact of DelCostello, and thus determining that the six month limitations period of the NLRA applied, the Seventh Circuit addressed the commencement issue. The plaintiff claimed that the limitations

period had still not yet begun to run, alleging that a final determination had not been made on her request that the union file a grievance. Citing an earlier decision, Hall v. Printing and Graphic Arts Union, Local No. 3, 696 F.2d 494 (7th Cir. 1982), the Seventh Circuit observed that under the collective bargaining agreement "the failure to file the grievance had the same finality effect as an arbitration award." 715 F.2d at 303. Thus, "the alleged 'refusal and failure' of the union to act amounted to a final determination." Id. With respect to plaintiff's additional argument that she had never been formally notified that her request would not be acted upon, the Seventh Circuit, in language nearly

identical to that found in Adkins, supra, held that at some point prior tc six months preceding the filing of her suit, the plaintiff "knew, or at least should have known" that the union was not taking any action on her behalf. Id. at 304 (emphasis added). Official notification was thus clearly unnecessary. Id. See again, Bowman, supra, slip op. at 5.

This Court finds the Adkins and Metz reasoning to be persuasive. We thus hold that in a hybrid § 301/fair representation case the limitations period begins to run no later than the time when the plaintiffs knew or reasonably should have known that a breach of the duty of fair representation had occurred. The

limitations period with respect to the specific claim against the employer for breach of the collective bargaining agreement, of course, begins to run no later than that same date. Metz, 715 F.2d at 306; Adkins, 113 LRRM at 2151.

The evidence presented by deposition and affidavit supports the defendants' position that the plaintiffs, who filed their complaint on November 16, 1981, are now time-barred. The evidence shows that Mr. Donald Browning, a plaintiff herein and then union steward for the Reading drivers, filed grievances with the Union on January 12 and 13, 1981 (Browning Dep. pp. 47, 48, 65, 78). The Reading drivers had been discharged effective the last working day of 1980 (Browning

Aff. para. 11). Browning took the grievances to Mr. James Simon and Mr. Paul Lake of SDI. He also presented a copy of the grievances to union president Gerald Kiser and to business agent, Ken Watson (Browning Dep. pp. 48-50).

Browning stated at his deposition that he did everything to ensure that the grievances were properly filed. He stated that under the grievance procedure a meeting with the company was supposed to be arranged within a given number of days (Browning Dep. p. 50). He stated that if satisfactory results were not then obtained, the grievances would thereafter go to arbitration. Browning stated, however, that the union never did anything with the grievances.

He stated that he kept asking Mr. Watson about the grievances and kept getting put off. Id. He stated he was constantly told the same thing, namely that nothing would be done until union president Kiser gave his approval. Id.

Concerning his discussions with Mr. Kiser, Browning further stated in his deposition testimony and in an affidavit filed with this Court that in January, 1981 Kiser told him that Reading employees were "nothing but a burr under his saddle" and that "he [would] be glad when [they] [were] all gone." (Browning Dep. p. 50; Browning Aff. para. 14). Browning stated that on another occasion Kiser told him that he was going to keep out of Reading's business and would do nothing about the

grievances and would not spend any more money on the grievances (Browning Aff. para. 14). Browning made this same statement at his deposition (Browning Dep. pp. 20, 50).

Finally, we note also that Browning stated at his deposition that it was at about this time, January, 1981, that "as a group [they] decided that [they] needed to go another route." (Browning Dep. p. 21). Asked why this was so, Browning answered, "Well, from the statements that was [sic] made from the union." Id. Browning continued his answer by indicating that the union attorney, Mr. Bruce Pence, had told them that he could not do anything further for them. Id. Despite evidence in the record which

establishes that Bruce Pence did in fact file unfair labor practice charges with the NLRB, and pursue those charges through the appeals stage, all of the foregoing shows very conclusively that by late January, 1981 or early February, 1981, the plaintiffs, through their representative, Mr. Browning, knew or should have known that the union, per union president Gairald Kiser, was not going to act upon their contractual grievances. 2/ The breach of the duty of fair representation, therefore, accured no later than late January, 1981 or early February 1981. See Footnote 2, supra. Thus, absent any tolling, the six month limitations period began to run from that time forward. 3/

2/ See next page

2/ Plaintiffs' counsel recently (November 21, 1983) obtained and attached to the memorandum in opposition (doc. 37) affidavits from four of the plaintiffs, including one from Mr. Browning. In these affidavits the four plaintiffs all allege that Mr. Kiser removed Mr. Pence from the matter in January, 1981; that following a stormy meeting in late January, 1981, Mr. Kiser reluctantly reinstated Mr. Pence; that Mr. Pence thereafter filed unfair labor practice charges with the NLRB and pursued those charges through appeal to NLRB general counsel; and that they learned that the appeal had been denied in June, 1981. The four plaintiffs state that it was at that time, i.e. June, 1981, that they first learned that the union would not process the original grievances. (See Exhibits 3, 4, 5 and 6 to doc. 37). Other evidence of record establishes that Mr. Pence did in fact pursue two different NLRB charges as representative for the union. (See Exhibits 1-6 to the Aff. of Daniel Rosenthal, said affidavit itself attached in support of

defendants SDI's and Scharfenberger's original motion for summary judgment, doc. 9).

It appears to be plaintiffs' counsel's position that, in light of the foregoing, the plaintiffs could reasonably have believed that because the union, through attorney Bruce Pence, was pursuing NLRB charges, further help would or might be forthcoming thereafter with respect to the original grievance. (See the argument, doc. 37, p.3). Echoing the four affidavits cited above, plaintiffs' counsel asserts that "[a]t that time [June, 1981], Local 100 refused to do anything on [plaintiffs'] behalf, including the processing of their original grievances." (doc. 37, pp. 3-4).

This last statement, however, is totally unsupported and indeed flys in the fact of the statements made by union representative Browning at his deposition and in his first affidavit. Again, that evidence clearly shows that by late January, 1981 or early February, 1981 union president Kiser had emphatically declared that

the union would do nothing on the grievance. From that point on, the plaintiffs knew or should have known that a breach of the duty of fair representation had occurred, as the union's duty in this case was to pursue the contractual grievances of its individual members. The fact that the union reluctantly offered to permit a union hired attorney to pursue an independent remedy offers no support to plaintiffs' case. Regardless of Mr. Pence's actions before the NLRB, the plaintiffs knew or should have known by early February, 1981 that nothing would be done on their contractual grievances. Therefore, the breach occurred at that time.

3/ We note also that the plaintiffs advance the claim that the SDI hiring process was "ongoing and continued until late March or April" (doc. 37, p. 4). Citing Adkins, supra, the plaintiffs contend that "this was the earliest they could or should have known that a breach of the duty of fair representation had taken place" (doc. 37, p. 4). Plaintiffs' argument in this regard is not persuasive. The plaintiffs last worked in late December, 1980. The grievances filed by their representative, union steward

Browning, had not been acted upon by either the company or the union. Thus, as previously noted herein, by late January or early February Browning himself realized that no help would be forthcoming from the union. (See again Browning Dep. pp. 21-22). The fact that SDI may not have completed its hiring until late March or early April is not significant. The plaintiffs did not lose their job at the time. Clearly, their jobs had been lost much earlier. The limitations period thus, barring any tolling, began to run in late January, 1981 or early February, 1981.

Finally, we observe also that, in any event, if the late March or early April date suggested by the plaintiffs is accepted, the filing of the complaint on November 16, 1981 still occurred more than six months after the limitations period. Thus, this later date, even were it accepted, would be of no help to plaintiffs.

LIMITATIONS PERIOD NOT TOLLED

Plaintiff's next claim that "regardless of the actual date when the cause of action may have accrued, the statute of limitations would have been tolled from the last week of January until the first week of June" (doc. 37, p.4). Once more, the plaintiffs claim that they were not aware that their NLRB charges had been denied until June, 1981. The claim is made, therefore, that until that time the plaintiffs "were held in limbo" and "awaited the outcome of this alternate plan." Id. at pp. 3 and 5). In essence, plaintiffs maintain thus that the pendency of the NLRB charges, which could have obtained satisfactory relief, served to toll the

running of the limitations period of this case.

We note first that the Supreme Court did not summarily reject out-of-hand petitioner DelCostello's claim that "certain events" operated to toll the running of the statute in his case. Instead, the Court remanded DelCostello's cause back to the district court for consideration of the tolling issue. 103 S.Ct. at 2294. At the same time, we must also note that the factual situation presented in DelCostello's case was very different from that presented in the case now before us. Specifically, DelCostello claimed that he effectively made a request for reconsideration of an adverse arbitration ruling, a request which

alleged tolled the running of the statute. Here, by contrast, the claim is very simply that the pendency of the NLRB charges operates a tolling effect.

The precise argument raised here was recently considered and rejected by Judge Rice. Citing Santos v. District Council of New York City, 619 F.2d 963 (2d Cir. 1980), Judge Rice first held generally in Adkins, supra that a § 301 action accrues when plaintiffs "knew or reasonably should have known that [a breach of the duty of fair representation] had occurred, even if some possibility of nonjudicial enforcement remained." 113 LRRM at 21-51 (emphasis added). Just a few months later in Association of Frigidaire Model Makers v. General

Motors Corp., No. C-1-3-81-343 (S.D. Ohio, Sept. 21, 1983) Judge Rice squarely dealt with the NLRB pendency tolling question, Citing Vaca v. Sipes, 386 U.S. 171 (1967) and Hudson v. Teamsters Local Union No. 957, 536 F. Supp. 1138 (S.D. Ohio 1982), Judge Rice observed that a § 301 action is entirely independent of any and all NLRB proceedings. Slip op. at 4-5. Noting that at least one Court, the First Circuit in McNutt v. Airco Industrial Gases Division, 687 F.2d 539 (1st Cir. 1982), has "intimated in dicta" that the filing of a NLRB complaint does not toll the running of the statute of limitations on a § 301 action, Judge Rice denied the tolling claim and dismissed the action as time-barred.

Id. at 5. See also Judge Rice's decision in Former Frigidaire Employees Association v. Internation Union of Electrical, Radio and Machine Workers, Local 801, 573 F. Supp. 59, 61 (S.D. Ohio 1983).

As defendants point out, there is additional general authority which supports Judge Rice's tolling decisions. In Johnson v. Railway Express Agency, Inc., 421 U.S. 455 (1975), for example, the Supreme Court held that the timely filing of a charge with the EEOC pursuant to § 706 of Title VII did not toll the running of the statute of limitations applicable to an action, based upon the same facts, brought under 42 U.S.C. § 1981. The Court expressly found "no policy reason that excuses [plaintiffs'] failure to

take the minimal steps necessary to preserve each claim independently." 421 U.S. at 465-66. Interpreting the Supreme Court's decision in Johnson as well as the Supreme Court's earlier decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Sixth Circuit in Guy v. Robbins & Meyers, Inc., 525 F.2d 124 (6th Cir. 1975), aff'd in pertinent part sub nom., Electrical Workers v. Robbins & Meyers, Inc., 429 U.S. 229 (1976), stated:

> The court [in Gardner-Denver] referred to the legistrative history which indicated Congressional intent that any employee could pursue any remedy which he may have under state of federal law. Thus, the employee could file proceedings under the National Labor Relations Act or with other federal, state or local agencies or pursue contractual remedies.

> In Johnson v. Railway Express Agency, supra, the court held that the various remedies are separate, distinct and independent.'
>
> It would be utterly inconsistent with the thesis of Gardner-Denver and Railway Express Agency to hold that the pursuit of any of these remedies operates to toll other remedies which the employee has the right to resort to concurrently.

525 F.2d at 126.

As defendants point out, a policy allowing the § 301 statute of limitations to be tolled indefinitely while a NLRB charge is processed could well reasonably protract labor disputes. This would, in fact, contravene the very strong federal policy favoring the prompt resolution of labor disputes. See Generally, United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 63-64 (1981); Badon v. General

Motors Corp., 679 F.2d 93, 97-98 (6th Cir. 1982); Metz v. Tootsie Roll Industries, supra; Adkins v. General Motors Corp., supra.

In view of all of the foregoing, this Court holds that on this set of facts the filing of the NLRB charges did not act to toll the running of the six month statute of limitations made applicable by DelCostello. Once again, the breach of the duty of fair representation occurred when the union, through its president, Mr. Kiser, flatly refused to process or otherwise consider the grievances filed by the plaintiffs. The evidence previously cited establishes beyond any question that the plaintiffs, through their representative, Donald Browning, knew or should have known by late January, 1981

or early February, 1981 that nothing would be done on the grievances. The fact that NLRB charges were filed by an attorney presumably compensated by the union does not aid the plaintiffs for this was an independent remedy available to them. As we view it, the union's duty was to fairly represent the plaintiffs by processing their contractual grievances with the company. The union was not under a duty to pursue charges with the NLRB. That the union reluctantly allowed such charges to be filed does not alter the fact that it had been made very clear that nothing would be done on the grievances themselves.

As was the case in Johnson, supra, the plaintiffs could easily have taken "the minimal steps necessary" to

preserve their statutory claim. See again Johnson, 421 U.S. at 465-66. The union members were not, as the claim has been made, "held in limbo", unable to do anything until the NLRB decision had been reached. Clearly, the plaintiffs had ample time and opportunity to preserve their statutory rights. As they knew or should have known that the grievances would not be processed, they surely could have taken some action in this regard many months earlier. Failing to do so, it is clear that the complaint filed herein is time-barred.

Accordingly, the various motions for summary judgment and/or motions to dismiss all of defendants should be granted.

SO ORDERED.

TIMOTHY S. HOGAN
United States Senior
District Judge

APPENDIX C

SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, 29 U.S.C. § 185

§ 185. **Suits by and against labor organizations--Venue, amount, and citizenship**

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States

shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or

subsequently ratified shall not be controlling.
June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

APPENDIX D

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1)

§ 2000e-5 Enforcement Provisions

. . .

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, government agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a

civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, government agency, or political subdivision, or the Commission has not entered into a concilation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the

court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

APPENDIX E

Ohio Revised Code §§ 2305.07; 2305.09; 2305.10

§ 2305.07 Contract not in writing

Except as provided in section 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture on penalty, shall be brought within six years after the cause thereof accrued.

§ 2305.09 Four years; certain torts

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;
(B) For the recovery of personal property, or for taking or detaining it;
(C) For relief on the ground of fraud;
(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is

discovered; nor, if it is for fraud, until the fraud is discovered.

§ 2305.10 Bodily injury or injury to personal property.

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

APPENDIX F

Rule 56(c), Federal Rules of Civil Procedure

Rule 56. Summary Judgment

. . .

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-628

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

KENNETH P. BIPPUS, et. al.,

Petitioners,

vs

LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et. al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

Brief in Opposition for Respondents Reading Central Mixed Concrete, Inc. and Clyde W. Woeber

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QUESTIONS PRESENTED

1. Where Petitioners were fully aware that their union would not pursue a grievance which is the basis of the alleged claim, and knew or should have known that a breach of fair representation had occurred, does the pendency of an unfair labor practice charge toll the running of the six month statute of limitations applicable to a "hybrid" Section 301 suit?

2. Whether this Court's decision in *DelCostello v. International Brotherhood of Teamsters* establishing a six month statute of limitations for hybrid Section 301 cases should be applied retroactively where the retroactive or prospective application of the decision will not alter the holdings below of the District Court and the Sixth Circuit Court of Appeals?

3. Whether the decision of the District Court below, which was affirmed by the Sixth Circuit Court of Appeals, properly awarded summary judgment in favor of Respondents where Petitioners' own testimony clearly revealed that Petitioners' claim was barred by the applicable statute of limitations?

RULE 28.1 RELATED PARTIES STATEMENT

Clyde W. Woeber
Reading Central Mixed Concrete, Inc.
No parent companies, subsidiaries (except wholly owned) or affiliates exist.

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OPINIONS BELOW

The opinion of the District Court for the Southern District of Ohio and the opinion of the Court of Appeals for the Sixth Circuit, both unreported, are set forth in the Appendix to this Brief in Opposition.

STATEMENT OF THE CASE

A. *Procedural Posture.*

On November 16, 1981, approximately nine months after the date on which Respondents became aware that the grievances they filed would not be pursued by their local union, Petitioners filed a complaint in United States District Court for the Southern District of Ohio. The complaint, a hybrid Section 301 suit, alleged, among other claims, that Respondents Reading Central Mixed Concrete, Inc. ("Reading") and Clyde W. Woeber breached a collective bargaining agreement that existed between Reading and Local 100 of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America ("Local 100"). Petitioners are members of Local 100.

All of the Respondents, after conducting discovery, filed motions for summary judgment and motions to dismiss on the basis that Petitioners' claim was barred by the statute of limitations. On January 10, 1984, Judge Hogan for the District Court of the Southern District of Ohio granted Respondents' motions for summary judgment and dismissal. (App. A at p. 12a).

Petitioners appealed this decision to the Sixth Circuit Court of Appeals on February 2, 1984 solely on the basis that Judge Hogan incorrectly determined that the six month statute of limitations period accrued in late January or early February of 1981. During the pendency of the appeal with the Sixth Circuit, Petitioners moved the Sixth Circuit to stay its proceedings and remand the case to the District Court for the limited purpose of allowing the District Court to hold an evidentary hearing on a Rule 60(b) Motion filed by Petitioners. Petitioners filed the motion on December 28, 1984, which requested that the District Court vacate its judgment to allow Petitioners to amend their complaint to allege a new cause of action. The Sixth Circuit affirmed the District Court's opinion awarding summary judgment to Respon-

dents, and denied Petitioners' Motion to Stay Proceedings and For Limited Remand. (App. B at p. 5b).

After the date on which the initial District Court complaint was filed by Petitioners, and after the filing of the appeal to the Sixth Circuit Court of Appeals by Petitioners, Petitioners filed a second complaint in the United States District Court for the Southern District of Ohio against the same Respondents alleging different causes of actions based upon the same occurrences as alleged in the complaint initially filed by Petitioners. The second lawsuit, filed on March 20, 1984, remains pending. Petitioners have now filed their Writ for Certiorari with this Court from the Sixth Circuit's Opinion filed on July 17, 1985.

B. *Statement of Facts.*

Plaintiffs are former employees of Reading who were not hired by SDI Reading Concrete, Inc. ("SDI") when Reading sold its business to SDI in January of 1981. Reading, as a result of the sale of its business, laid off its employees on the last working day of 1980. The sale occurred on January 2, 1981, and prior to that date, SDI made no commitment as to the number of Reading employees that would be hired.

SDI hired a portion, but not all, of the Reading employees in January of 1981. SDI also recognized Local 100 as the collective bargaining agent for its employees and negotiated a new collective bargaining agreement with Local 100. Local 100 failed to execute the agreement and later was forced to do so by the NLRB issuing a complaint enforcing the collective bargaining agreement.

On February 5, 1981, Local 100 filed an unfair labor practice charge claiming that SDI was the alter ego of Reading and that SDI was obligated to perform under the collective bargaining agreement that was executed between Reading and Local 100. This charge was dismissed on March

18, 1981 by the Regional Director for the Cincinnati Region of the NLRB. (App. A at p. 13a n. 2).

On April 30, 1981, Local 100 filed another charge with the NLRB alleging that SDI's failure to hire several of the Reading employees was based upon their prior union involvement. This charge was also dismissed, with such dismissal being affirmed by the NLRB's general counsel. (App. A at p. 13a n. 2).

Petitioner Donald Browning ("Browning"), who was the union steward for Petitioners while employed at Reading, filed grievances alleging that the discharge of Petitioners was in violation of the existing collective bargaining agreement between Reading and Local 100. These grievances were filed on January 12 and 13 of 1981. (App. A at p. 7a).

In late January of 1981, Browning became fully aware that the Petitioners' grievances would not be pursued by the union. Browning specifically stated that in January of 1981, he was told by Local 100 president Kiser that Petitioners, as a group, "needed to go another route" because Local 100 had no intention of processing the Petitioners' grievances. (App. A at p. 8a).

Browning further stated that Local 100 president Kiser told him that the Reading employees were nothing but a "burr under his saddle" and that "he'll be glad when [they] are all gone." Local 100 president Kiser told Browning at that time that Local 100 would do nothing concerning the Petitioners' grievances and that the union would not spend any additional money on the Petitioners' grievances. (App. A at p. 8a).

Browning emphatically stated that Local 100 never processed the grievances in any manner. He stated that he continually asked Local 100 business agent Watson about the grievances, and that he received no response. He was continually told that nothing would be done with the

Petitioners' grievances until Local 100 president Kiser consented to such action. Browning had no discussion with Local 100 president Kiser after January of 1981. (App. A at p. 8a).

In light of the statements made by Browning, the Petitioners were fully aware that the grievances would not be pursued by Local 100. The grievances were not pursued by Local 100 and were not processed to arbitration. (App. A at p. 12a).

SUMMARY OF ARGUMENT

The issues raised by Petitioners in their Petition for Writ of Certiorari do not warrant review by this Court. First, there is no conflict among the Circuits on the question of whether a pending NLRB action tolls the six month statute of limitations that applies to hybrid Section 301/fair representation actions. Those circuit and district courts that have addressed this issue have held that the statute is not tolled by a pending NLRB action. Furthermore, this Court has held, in the substantially similar situation of Equal Employment Opportunity Commission ("EEOC") and Section 1981 claims, that the filing of an EEOC charge does not toll the running of the limitations period for a Section 1981 action based on the same facts.

Petitioners' argument raised for the first time in this Court, that this Court's *DelCostello* decision should not be applied retroactively, was waived by their agreement to its retroactive application in the District Court below. Additionally, the former Ohio statute of limitations period for Section 301 actions was ninety days, so that Petitioners' cause would not be aided even if *DelCostello* were not retroactively applied. Therefore, this Court's determination of this issue would not alter the decisions of the District Court and the Sixth Circuit Court of Appeals.

Finally, none of the issues raised by Petitioners as "important questions of federal labor law" were essential to the holdings of the Sixth Circuit and District Court in this case. Thus, even if this Court was to review this case on the merits, it would have no occasion to reach those issues of alleged importance.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETITIONERS' REQUEST FOR REVIEW RAISES NO ISSUES OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW BY THIS COURT, AND THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL ON THE ISSUES RAISED BY PETITIONERS.

A. The Statute of Limitations for a hybrid Section 301/ fair representation case is not tolled by the Filing of the Unfair Labor Practice Charge.

1. *Courts that have addressed the issue are in unanimity that the statute of limitations is not tolled.*

Petitioners argue that the filing of an unfair labor practice charge with the National Labor Relations Board ("NLRB") should toll the six month statute of limitations held applicable to hybrid Section 301/fair representation actions by this Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). While this Court has never ruled on this precise issue, those Courts of Appeals which have ruled on this issue are in agreement that the filing of an unfair labor practice charge with the NLRB does not stop the running of the six month statute of limitations applicable to Section 301 actions.

The United States Court of Appeals for the Fourth Circuit in *Kolomick v. United Steelworkers of America, Dis-*

trict 8, ALF-CIO, 762 F.2d 354 (4th Cir. 1985) stated that "[a] rule tolling the time period within which to file a § 301 claim in federal court simply by virtue of filing a claim with the NLRB would be contrary to the rationale underlying *DelCostello* and would not effectuate congressional goals." *Id* at 356. The United States Court of Appeals for the Eighth Circuit reached the same conclusion in *Aarsvold v. Greyhound Lines, Inc.,* 724 F.2d 72, 73 (8th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S. Ct. 3538 (1984).

Petitioners point to the Ninth Circuit's decision in *Aragon v. Federated Department Stores Inc.,* 750 F.2d 1447 (9th Cir. 1983), as a case "conflicting" with the other circuits. However, that case did not hold that the filing of a NLRB charge would toll the statute of limitations. The court did not reach the issue because on the facts of that case, no equitable tolling had occurred. In fact, the *Aragon* court recognized that in light of *DelCostello,* "the federal courts may also be precluded from borrowing the states' tolling provisions." *Id.* at 1454. The court noted in dicta that *if* it were appropriate to apply a state's tolling provision to a Section 301 action, then under California law a pending NLRB action might under some circumstances toll the running of the statute. *Id.* However, Petitioners are incorrect when they assert that the Ninth Circuit's approach "appears to vary" from those of the Sixth and Fourth Circuits. The Ninth Circuit, having never been squarely faced with this issue, has refrained from ruling on it.

Thus, contrary to Petitioners' assertion, there is no conflict among the circuits on this question. In fact, virtually all courts that have considered the question of whether an NLRB charge tolls the limitations period for filing a § 301 action have held that it does not. *See, e.g., Former Frigidaire Employees Ass'n v. International Union of Electrical Workers,* 573 F. Supp 59, 61 (S.D. Ohio 1983); *Association of Frigidaire Model Makers v. General Motors Corporation,* 573 F.Supp 236, 269 (S.D. Ohio 1983); *Estades v. Harry M. Stevens, Inc.,*

593 F. Supp 778, 782 (D. P.R. 1984); *Bey v. Williams,* 590 F. Supp. 1150, 1154 (W.D. Pa. 1984); *Boyd v. Teamsters Local 553,* 589 F. Supp. 794, 796 (S.D.N.Y. 1984). Far from championing a cause which is the subject of dispute among the circuits, Petitioners are asking this Court to decide a question on which there currently is unanimity among courts that have addressed the issue.

2. This Court has decided against tolling under substantially identical facts.

These decisions holding against tolling are in line with this Court's holding in *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 455 (1975). In *Johnson,* this Court held that the timely filing of a charge with the Equal Employment Opportunity Commission ("EEOC") pursuant to Section 706 of Title 7 did not toll the running of the statute of limitations applicable to an action, based on the same facts, which was brought under Title 42 U.S.C. § 1981. The reasoning of this Court in *Johnson* is particularly applicable to this case as there is no policy reason that excuses Petitioners' failure to take the minimal steps necessary to preserve each claim independently.

Additionally, tolling of the statute of limitations during the pendency of an NLRB charge would unreasonably protract labor disputes. This is inconsistent with this Court's strong policy of favoring the prompt resolutions of labor disputes. *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 63-64 (1981).

B. Petitioners Raise For The First Time The Retroactivity Issue Which If Decided by this Court Would Not Alter The Decisions Of the District Court And The Sixth Circuit Below On The Facts Of This Case.

Petitioners assert that this Court's decision in *DelCostello* establishing a six month statute of limitations in a "hybrid" § 301/fair representation case should not be applied

retroactively. It should be noted that Petitioners raise this issue of non-retroactivity for the first time in this Court. This issue was not raised in the Petitioners' brief to the Sixth Circuit, and in fact, Petitioners conceded in the District Court that *DelCostello* should be given retroactive effect. (App. A at p. 5a). Therefore, Petitioners have waived this issue, and it properly should not be considered by this Court. *See, Kosak v. United States,* ____ U.S. ____, 104 S.Ct. 1519, 1522 n.2 (1984); *United States v. Lovasko,* 431 U.S. 783, 787 n.7 (1977).

However, even if this issue of retroactivity is not waived, this Court does not have reason to address it on the facts of this case. Before *DelCostello,* federal courts appling Ohio law had consistently held that the appropriate statute of limitations for § 301 claims was the Ohio Statute of Limitations governing suits to vacate arbitration awards, which is a period of ninety days. *See, e.g., Lawson v. Truck Drivers, Chauffers and Helpers, Local Union 100,* 698 F.2d 250, 253-54 (6th Cir. 1983); *Rachubka v. Incom International,* 555 F.Supp. 552 (N.D. Ohio 1982); *Ward v. Alside, Inc.,* 550 F.Supp. 1074, 1076-77 (N.D. Ohio 1982); *Lamore v. Innland Division of General Motors Corp.,* 550 F.Supp. 1005, 1015 (S.D. Ohio 1982); *Baldridge v. Arkansas Best Freight System Inc.,* 550 F.Supp. 1159, 1170 (S.D. Ohio 1982). Thus, *DelCostello* actually extended Petitioners' time for filing their § 301 claim under the facts of this case, and if this Court were to ignore Petitioners' waiver of this issue and review the question presented, it would not aid the Petitioners in this case.

C. The Decision Below Is Correct Without Regard To Petitioners' Points of Alleged Importance.

The Court of Appeals, in upholding the District Court's decision in this case, found that the evidence showed that Petitioners knew or should have known more than six months prior to the filing of their suit that their cause of action had accrued. The finding was based upon testimony given by Petitioners' former union steward which "amply

reveal[ed] an open hostility and unwillingness on the part of the union president . . . to have anything to do with the [Petitioners'] grievances." (App. B at p. 3b). The Court of Appeals found that this evidence of hostility "was not assuaged or contradicted by . . . the [Petitioners'] false hope of success before the NLRB." (App. B at p. 3b). It is therefore clear that Petitioners knew or should have known of the accrual of their § 301/fair representation claim in January or February of 1981, regardless of the outcome of their NLRB charge. The issue of the running of the limitations period thus resolves itself essentially to a question of fact, not of law. The question of fact being at what time did Petitioners know, or should have known, that the union had breached its duty of fair representation to them.

Thus, even if in some circumstances the filing of an NLRB charge could be said to toll the statute of limitations for a § 301/fair representation action, the decisions of both lower courts in this case rest on the *factual* finding that here, Petitioners knew or should have known of the accrual of their cause of action long before their NLRB claim had been resolved. Petitioners are asking this Court to review a factual finding made by the District Court and upheld by the Sixth Circuit. On the facts of this case, there would be no reason for this Court to reach the "important questions of federal labor law" that Petitioners urge are raised in this case.

CONCLUSION

It is clear that there is no conflict among the Circuit Courts of Appeal on the issues raised in the Petition for Writ of Certiorari. It is also clear that even if important issues are raised in the Petition, this Court would have no occasion to reach them because the decisions of the District Court and the Court of Appeals were correct regardless of Petitioners' points of alleged importance. Therefore, this case raises no issues of sufficient importance to warrant review by this Court.

For all of the above reasons, Respondents Reading Central Mixed Concrete, Inc. and Clyde W. Woeber respectfully request that this Court deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

BY: _____

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KENNETH P. BIPPUS, et al.,	) No. C-1-81-906
Plaintiffs.	) OPINION AND ORDER : GRANTING MOTION OF) DEFENDANTS SDI READ-
vs.	: ING CONCRETE, INC.) AND IRVIN T. SCHARFEN-
LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,	: BERGER FOR SUMMARY) JUDGMENT, GRANTING : MOTION OF DEFEND-) ANTS READING CEN-
Defendants.	: TRAL MIXED CONCRETE,) INC. AND CLYDE W. : WOEBER FOR SUMMARY) JUDGMENT, AND GRANT- : ING MOTION TO DISMISS) OF DEFENDANT TRUCK : DRIVERS, CHAUFFEURS) AND HELPERS LOCAL : NO. 100
HOGAN, S.J.	)

INTRODUCTION

This matter came on for consideration of defendants SDI Reading Concrete, Inc.'s (SDI) and Irvin T. Scharfenberger's second motion for summary judgment (doc. 33), the first motion for summary judgment submitted by those defendants having been denied by this Court approximately one year ago (doc. 25). In addition to the aforementioned second motion for summary judgment, defendants Reading Central Mixed Concrete, Inc. (Reading) and Clyde W. Woeber

have filed a separate motion for summary judgment (doc. 36) and defendant Truck Drivers, Chauffeurs and Helpers Local Union No. 100 has filed a motion to dismiss (doc. 38). This last motion will be treated as a motion for summary judgment. Plaintiffs have filed a memorandum in opposition to defendants SDI's and Irvin Scharfenberger's second motion for summary judgment (doc. 37). By letter of November 29, 1983, plaintiffs' counsel asks this Court to consider the three separate defense motions collectively, maintaining that all three raise the same basic issues. Plaintiffs' counsel states that plaintiffs do not intend to file a separate memorandum in opposition to defendant Reading's and defendant Woeber's motion for summary judgment or to Local 100's motion to dismiss. In this regard, plaintiffs' counsel asks this Court to consider the plaintiffs' memorandum in opposition to the motion of defendants SDI and Scharfenberger for summary judgment as being applicable to all of the aforementioned defense motions. The Court has considered plaintiffs' memorandum in accord with this request. Finally, consideration has also been given to defendant SDI's and defendant Scharfenberger's reply memorandum in support of their second motion for summary judgment (doc. 39).

FACTUAL BACKGROUND

As previously stated by this Court (doc. 25), this case involves various federal and common law causes of action arising out of a labor dispute. The labor dispute was prompted by defendant Woeber's sale of Reading in January, 1981. Prior to the sale, plaintiffs were employees of Reading.

The pertinent facts relating to the labor dispute need not be further set forth in great detail, as they have previously been noted (*see again* doc. 25). In essence, plaintiffs claim that their jobs were protected by a provision, Article 16, found in a collective bargaining agreement then existing (prior to defendant Woeber's sale of Reading) between defend-

ant Reading and defendant Local 100. Plaintiffs maintain that pursuant to Article 16 of the Reading/Local 100 agreement, any purchaser of Reading was bound to assume the entire collective bargaining agreement. Plaintiffs allege that defendants Woeber and Reading violated that agreement by entering into a purchase agreement which did not require such an assumption. Plaintiffs allege further that Local 100 violated its duty of fair representation by failing to enforce the Reading labor agreement. Finally, as stated by plaintiffs' counsel in the memorandum in opposition to the defense motions, plaintiffs' claim for relief against defendants SDI and Scharfenberger is based upon the theory that SDI is the "alter ego" of Reading, and upon the claim that defendants SDI and Scharfenberger conspired with defendant Reading to tortiously interfere with the Reading/Local 100 collective bargaining agreement.

PROCEDURAL BACKGROUND

Preliminarily, it should be observed that the original motion for summary judgment of defendants SDI and Scharfenberger was based upon three principle grounds: (1) a claim that as a matter of law, SDI should not be viewed as being the alter ego of Reading; (2) a claim that if plaintiff prevails on his claims against defendants SDI and Scharfenberger, an impermissible conflict with a NLRB approved settlement would arise; and (3) a claim that plaintiffs failed to timely exhaust available contractual grievance procedures prior to filing this action. (*See generally* doc. 25, p. 4). In denying the original motion for summary judgment this Court held, in response to the aforementioned claims, that: (1) a determination of whether a factual issue exists as to SDI's alter ego status, along with a determination of how much deference should be afforded the investigative findings of the NLRB, was not appropriate prior to the completion of discovery; (2) that because a conflict with the NLRB settlement could only occur from the nature of the relief granted, if any,

concern with a possible conflict was premature; and (3) that plaintiffs would have to be granted the opportunity to demonstrate, via discovery, that a factual issue existed regarding the attempt to timely grieve the disputed discharges. In thus denying the original motion for summary judgment, we closed by stating that defendants were nonetheless free to renew their motion upon completion of discovery (doc. 25, p. 8).

The foregoing review is necessary as plantiffs' opposition to the various defense motions now presented is based in part upon the claim that discovery has not in fact yet been completed. From this, the plaintiffs argue that defendants SDI and Scharfenberger have violated this Court's prior Opinion and Order by prematurely renewing their motion.

Arguably, there may be a question as to whether the aforementioned language directed to defendants SDI and Scharfenberger should be directed as well to the other defendants in this case. Resolution of that question, however, is unnecessary for the reason that the present motions of the various defendants are based largely upon a question involving the statute of limitations, a question which, of course, was not raised earlier.[1] We find no reason why this new issue may not now be raised and considered. As set forth in the pages which follow, careful consideration leads this Court to conclude that plaintiffs' action is indeed barred by the applicable statute of limitations. Judgment will thus be entered in favor of all defendants, as set forth more fully later herein.

PLAINTIFFS' ACTION IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

The defendants maintain that the six month statute of limitations set forth in Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b), is controlling in this action pursuant to the Supreme Court's recent decision in *DelCostello v. International Brotherhood of*

Teamsters, U.S. , 103 S.Ct. 2281, 113 L.R.R.M 2737 (1983).

It is important to note, first that *DelCostello* did not involve a straightforward breach of contract suit brought under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. 103 S.Ct. at 2289. Rather, in *DelCostello,* as here, suit was brought against both the employer and against the union. As stated in *DelCostello,* the action against the employer is based upon § 301, for breach of a collective bargaining agreement. The action against the union, by contrast, is one for breach of the union's duty of fair representation, a duty "which is implied under the scheme of the National Labor Relations Act." *Id.* at 2290. "The suit is thus not a straightforward breach of contract suit under § 301, . . . but a hybrid § 301/fair representation claim, amounting to 'a direct challenge to the private settlement of disputes under (the collective-bargaining agreement.).' " *Id.* at 2291. In such a situation, the Court reasoned that the "balance of interests" involved would be best served by the application of the NLRA's six month statute of limitations.

Based on the foregoing, there can be no question that the six month NLRA limitation period applies to a hybrid § 301/fair representation suit such as the one at bar. The plaintiff does not contest this reading of *DelCostello.* Just as importantly, the plaintiffs expressly agree with the defendants' contention that *DelCostello* should be given retroactive effect (doc. 37, p.6). This Court concurs in the parties' retroactivity assessment, finding ample case authority to support such a position. *See e.g., Perez v. Dana Corporation, Parrish Frame Division,* No. 82-1547, slip op. (3rd Cir., Sept. 28, 1983); *see also,* the decision of Judge Rice of this District in *Dowty v. Pioneer Rural Electric Cooperative, Inc.,* No. C-1-3-82-005 (S.D. Ohio, Aug. 26, 1983), *appeal docketed,* No. 83-3621 (6th Cir., Sept. 22, 1983) and *McPeek v. Dayton Forging and Heat Treating Co.,* No. C-1-3-83-084 (S.D. Ohio, Aug. 26,

1983); *cf. Foltz v. Teamsters Local Union 414,* Civil No. 83-63 (N.D. Ind., Aug. 8, 1983).

Having determined that *DeCostello's* six month statute of limitations holding applies, two key questions remain open for consideration. First, at what point does the limitations period begin to run? Second, are there any circumstances under which the limitations period can be tolled?

With respect to the first of these questions, Judge Rice, in three well-reasoned opinions, has recently held that hybrid § 301/fair representation action accrues no later than the time plaintiffs *"knew or reasonably should have known that a breach of the duty of fair representation had occurred,* even if some possibility of nonjudicial enforcement remained." *Adkins v. General Motors Corp.*, 113 LRRM 2147, 2151 (S.D. Ohio 1983) (emphasis added); *see again Dowty, supra; McPeek, supra.* We note also that Judge Porter of this District came to this same conclusion in a case decided prior to *DelCostello. See Bowman v. Cincinnati Mine Machinery Co.*, No. C-1-82-1251 (S.D. Ohio, May 4, 1983). Then, too, the Seventh Circuit in *Metz v. Tootsie Roll Industries, Inc.* 715 F.2d 299 (7th Cir. 1983) recently reached this same result. After considering the impact of *DelCostello,* and thus determining that the six month limitations period of the NLRA applied, the Seventh Circuit addressed the commencement issue. The plaintiff claimed that the limitations period had still not yet begun to run, alleging that a final determination had not been made on her request that the union file a grievance. Citing an earlier decision, *Hall v. Printing and Graphic Arts Union, Local No. 3,* 696 F.2d 494 (7th Cir. 1982), the Seventh Circuit observed that under the collective bargaining agreement "the failure to file the grievance had the same finality effect as an arbitration award." 715 F.2d at 303. Thus, "the alleged 'refusal and failure' of the union to act amounted to a final determination." *Id.* With respect to plaintiff's additional argument that she had never been formally notified that her request would not be acted upon, the

Seventh Circuit, in language nearly identical to that found in *Adkins, supra*, held that at some point prior to six months preceding the filing of her suit, the plaintiff *"knew, or at least should have known"* that the union was not taking any action on her behalf. *Id.* at 304 (emphasis added). Official notification was thus clearly unnecessary. *Id. See again, Bowman, supra*, slip op. at 5.

This Court finds the *Adkins* and *Metz* reasoning to be persuasive. We thus hold that in a hybrid § 301/fair representation case the limitations period begins to run no later than the time when the plaintiffs knew or reasonably should have known that a breach of the duty of fair representation had occured. The limitations period with respect to the specific claim against the employer for breach of the collective bargaining agreement, of course, begins to run no later than that same date. *Metz*, 715 F.2d at 306; *Adkins*, 113 LRRM at 2151.

The evidence presented by deposition and affidavit supports the defendants' position that the plaintiffs, who filed their complaint on November 16, 1981, are now time-barred. The evidence shows that Mr. Donald Browning, a plaintiff herein and then union steward for the Reading drivers, filed grievances with the Union on January 12 and 13, 1981 (Browning Dep. pp.47, 48, 65, 78). The Reading drivers had been discharged effective the last working day of 1980 (Browning Aff. ¶ 11). Browning took the grievances to Mr. James Simon and Mr. Paul Lake of SDI. He also presented a copy of the grievances to union president Gerald Kiser and to business agent, Ken Watson (Browning Dep. pp. 48-50).

Browning stated at his deposition that he did everything to ensure that the grievances were properly filed. He stated that under the grievance procedure a meeting with the company was supposed to be arranged within a given number of days (Browning Dep. p.50). He stated that if satisfactory results were not the obtained, the grievances would

thereafter go to arbitration. Browning stated, however, that the union never did anything with grievances. He stated that he kept asking Mr. Watson about the grievances and kept getting put off. *Id.* He stated he was constantly told the same thing, namely that nothing would be done until union president Kiser gave his approval. *Id.*

Concerning his discussions with Mr. Kiser, Browning further stated in his deposition testimony and in an affidavit filed with this Court that in January, 1981 Kiser told him that Reading employees were "nothing but a burr under his saddle" and that "he [would] be glad when [they] [were] all gone." (Browning Dep. p.50; Browning Aff. ¶ 14). Browning stated that on another occasion Kiser told him that he was going to keep out of Reading's business and would do nothing about the grievances and would not spend anymore money on the grievances (Browning Aff. ¶ 14). Browning made this same statement at his deposition (Browning Dep. pp.20, 50).

Finally, we note also that Browning stated at his deposition that it was at about this time, January, 1981, that "as a group [they] decided that [they] needed to go another route." (Browning Dep. p.21). Asked why this was so, Browning answered, "Well, from the statements that was [sic] made from the union." *Id.* Browning continued his answer by indicating that the union attorney, Mr. Bruce Pence, had told them that he could not do anything further for them. *Id.* Despite evidence in the record which established that Bruce Pence did in fact file unfair labor practice charges with the NLRB, and pursue those charges through the appeals stage, all of the foregoing shows very conclusively that by late January, 1981 or early February, 1981, the plaintiffs, through their representative, Mr. Browning, knew or should have known that the union, per union president Gerald Kiser, was not going to act upon their contractual grievances.[2] The breach of the duty of fair representation, therefore, accrued no later than late January, 1981 or early February, 1981. *See* Footnote 2, *supra.* Thus, absent any toll-

ing, the six month limitation period began to run from that time forward.[3]

LIMITATIONS PERIOD NOT TOLLED

Plaintiff's next claim that "regardless of the actual date when the cause of action may have accrued, the statute of limitations would have been tolled from the last week of January until the first week of June" (doc. 37, p.4). Once more, the plaintiffs claim that they were not aware that their NLRB charges had been denied until June, 1981. The claim is made, therefore, that until that time the plaintiffs "were held in limbo" and "waited the outcome of this alternate plan." *(Id.* at pp.3 and 5). In essence, plaintiffs maintain that the pendency of the NLRB charges, which could have obtained satisfactory relief, served to toll the running of the limitations period in this case.

We note first that the Supreme Court did not summarily reject out-of-hand petitioner DelCostello's claim that "certain events" operated to toll the running of the statute in his case. Instead, the Court remanded DelCostello's cause back to the district court for consideration of the tolling issue. 103 S.Ct. at 2294. At the same time, we must also note that the factual situation presented in DelCostello's case was very different from that presented in the case now before us. Specifically, DelCostello claimed that he effectively made a request for reconsideration of an adverse arbitration ruling, a request which alleged tolled the running of the statute. Here, by contrast, the claim is very simply that the pendency of the NLRB charges operates a tolling effect.

The precise argument raised here was recently considered and rejected by Judge Rice. Citing *Santos v. District Council of New York City,* 619 F.2d 963 (2d Cir. 1980), Judge Rice first held generally in *Adkins, supra* that a § 301 action accrues when plaintiffs "knew or reasonably should have known that [a breach of the duty of fair representation] had

occured, *even if some possibility of nonjudicial enforement remained.*" 113 LRRM at 21-51 (emphasis added). Just a few months later in *Association of Frigidaire Model Makers v. General Motors Corp.*, No. C-1-3-81-343 (S.D. Ohio, Sept. 21, 1983) Judge Rice squarely dealt with the NLRB pendency tolling question. Citing *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Hudson v. Teamsters Local Union No. 957*, 536 F. Supp. 1138 (S.D. Ohio 1982), Judge Rice observed that a § 301 action is entirely independent of any and all NLRB proceedings. Slip op. at 4-5. Noting that at least one Court, the First Circuit in *McNutt v. Airco Industrial Gases Division*, 687 F.2d 539 (1st Cir. 1982), had "intimated in dicta" that the filing of a NLRB complaint does not toll the running of the statute of limitations on a § 301 action, Judge Rice denied the tolling claim and dismissed the action as time-barred. *Id.* at 5. *See also* Judge Rice's decision in *Former Frigidaire Employees Association v. International Union of Electrical, Radio and Machine Workers, Local 801*, 573 F. Supp. 59, 61 (S.D. Ohio 1983).

As defendants point out, there is additional general authority which supports Judge Rice's tolling decisions. In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 455 (1975), for example, the Supreme Court held that the timely filing of a charge with the EEOC pursuant to § 706 of Title VII did not toll the running of the statute of limitations applicable to an action, based upon the same facts, brought under 42 U.S.C. § 1981. The Court expressly found "no policy reason that excuses [plaintiffs'] failure to take the minimal steps necessary to preserve each claim independently." 421 U.S. at 465-66. Interpreting the Supreme Court's decision in *Johnson* as well as the Supreme Court's earlier decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Sixth Circuit in *Guy v. Robbins & Meyers, Inc.* 525 F.2d 124 (6th Cir. 1975), *aff'd in pertinent part sub nom., Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976), stated:

> The court (in *Gardner-Denver)* referred to the legislative history which indicated Congressional intent that any employee could pursue any remedy which he may have under state or federal law. Thus, the employee could file proceedings under the National Labor Relations Act or with other federal, statue or local agencies or pursue contractual remedies. In *Johnson v. Railway Express Agency, supra,* the court held that the various remedies are separate, distinct and independent.'
>
> It would be utterly inconsistent with the thesis of *Gardner-Denver* and *Railway Express Agency* to hold that the pursuit of any of these remedies operates to toll other remedies which the employee has the right to resort to concurrently.
>
> 525 F.2d at 126.

As defendants point out, a policy allowing the § 301 statute of limitations to be tolled indefinitely while a NLRB charge is processed could well reasonably protract labor disputes. This would, in fact, contravene the very strong federal policy favoring the prompt resolution of labor disputes. *See generally, United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 63-64 (1981); *Badon v. General Motors Corp.,* 679 F.2d 93, 97-98 (6th Cir. 1982); *Metz v. Tootsie Roll Industries, supra; Adkins v. General Motors Corp., supra.*

In view of all of the foregoing, this Court holds that on this set of facts the filing of the NLRB charges did not act to toll the running of the six month statute of limitations made applicable by *DelCostello.* Once again, the breach of the duty of fair representation occurred when the union, through its president, Mr. Kiser, flatly refused to process or otherwise consider the grievances filed by the plaintiffs. The evidence previously cited established beyond any question that the plaintiffs, through their representative, Donald Browning, knew or should have known by late January, 1981 or early February, 1981 that nothing would be done on the griev-

ances. The fact that NLRB charges were filed by an attorney presumably compensated by the union does not aid the plaintiffs for this was an independent remedy available to them. As we view it, the union's duty was to fairly represent the plaintiffs by processing their contractual grievances with the company. The union was not under a duty to pursue charges with the NLRB. That the union reluctantly allowed such charges to be filed does not alter the fact that it had been made very clear that nothing would be done on the grievances themselves.

As was the case in *Johnson, supra,* the plaintiffs could easily have taken "the minimal steps necessary" to preserve their statutory claim. *See again Johnson,* 421 U.S. at 465-66. The union members were not, as the claim has been made, "held in limbo", unable to do anything until the NLRB decision had been reached. Clearly, the plaintiffs had ample time and opportunity to preserve their statutory rights. As they knew or should have known that the grievances would not be processed, they surely could have taken some action in this regard many months earlier. Failing to do so, it is clear that the complaint filed herein is time-barred. Accordingly, the various motions for summary judgment and/or motions to dismiss of all defendants should be granted.

SO ORDERED.

Timothy S. Hogan
United States Senior District Judge

[1]It should be noted that defendants SDI and Scharfenberger have in fact renewed their claim that defendants failed to timely exhaust available contractual grievance procedures prior to bringing this action. In this regard, defendants SDI and Scharfenberger claim that further discovery relating to this issue is unnecessary (doc. 39, p. 9). Plaintiffs' counsel, of course, disagrees (doc. 37, p. 7). Although the defendants' position on this point appears to be solidly supported by the affidavits filed herein, we need not now decide this particular question, since disposition of this case is possible on statute of limitations grounds alone.

[2]Plaintiffs' counsel recently (November 21, 1983) obtained and attached to the memorandum in opposition (doc. 37) affidavits from four of the plaintiffs, including one from Mr. Browning. In these affidavits the four plaintiffs all allege that Mr. Kiser removed Mr. Pence from the matter in January, 1981; that following a stormy meeting in late January, 1981, Mr. Kiser reluctantly reinstated Mr. Pence; that Mr. Pence thereafter filed unfair labor practice charges with the NLRB and pursued those charges through appeal to NLRB general counsel; and that they learned that the appeal had been denied in June, 1981. The four plaintiffs state that it was at that time, *i.e.* June, 1981, that they first learned that the union would not process the original grievances. *(See* Exhibits 3, 4, 5 and 6 to doc. 37). Other evidence of record established that Mr. Pence did in fact pursue two different NLRB charges as representative for the union. *(See* Exhibits 1-6 to the Aff. of Daniel Rosenthal, said affidavit itself attached in support of defendants SDI's and Scharfenberger's original motion for summary judgement, doc. 9).

It appears to be plaintiffs' counsel's position that, in light of the foregoing, the plaintiffs could reasonably have believed that because the union, through attorney Bruce Pence, was pursing NLRB charges, further help would or might be forthcoming thereafter with respect to the original grievance. *(See* the argument, doc. 37, p. 3). Echoing the four affidavits cited above, plaintiffs' counsel asserts that "[a]t that time [June, 1981], Local 100 refused to do anything on [plaintiffs'] behalf, including the processing of their original grievances." (doc. 37, pp.3-4).

This last statement, however, is totally unsupported and indeed flys in the face of the statements made by union representative Browning at his deposition and in his first affidavit. Again, that evidence clearly shows that by late January, 1981 or early February, 1981 union president Kiser had emphatically declared that the union would do nothing on the grievance. From that point on, the plaintiffs knew or should have known that a breach of the duty of fair representation had occurred, as the union's duty in this case was to pursue the contractual grievances of its individual members. The fact that the union reluctantly offered to permit a union hired attorney to pursue an independent remedy offers no support to plaintiffs' case. Regardless of Mr. Pence's actions before the NLRB, the plaintiffs knew or should have known by early February, 1981 that nothing would be done on their contractual grievances. Therefore, the breach occurred at that time.

[3]We note also that the plaintiffs advance the claim that the SDI hiring process was "ongoing and continued until late March or April" (doc. 37, p.4). Citing *Adkins, supra*, the plaintiffs contend that "this was the earliest they could or should have known that a breach of the duty of fair representation had taken place" (doc. 37, p.4). Plaintiffs' argument in this regard is not persuasive. The plaintiffs last worked in late December, 1980. The grievances filed by their representative, union steward Browning, had not been acted upon by either the company or the union. Thus, as previously noted herein, by late January or early February Browning himself realized that no help would be forthcoming from the union. *(See again* Browning Dep. pp.21-22). The fact that SDI may not have completed its hiring until late March or early April is not significant. The plaintiffs did not lose their job at that time. Clearly, their jobs had been lost much earlier. The limitations period thus, barring any tolling, began to run in late January, 1981 or early February, 1981.

Finally, we observe also that, in any event, if the late March or early April date suggested by the plaintiffs is accepted, the filing of the complaint on November 16, 1981 still occurred more than six months after the limitations period. Thus, this later date, even were it accepted, would be of no help to plaintiffs.

APPENDIX B

NO. 84-3122
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH BIPPUS; WALTER BOLTON; EARL BORN; LEROY BOWERS; ROBERT BOWLING; DONALD BROWNING; MICHAEL BROERMAN; WILLIAM CAGEL; WAYNE CHEEK; JERRY CREWS; ROBERT DUMFORD JR.; ROBERT DUMFORD, SR.; WENDELL EVERSOLE; REX FOX; EDWARD FRESON; THOMAS GABBARD; ROLAND GIBSON; DAVID GRAU; JESS HARNEY; JAMES HOF; LAWRENCE HUBER; JERRY KINDRED; JOHN KRIEG; LESLIE LONAKER; WAYNE LYKINS; DONALD LYNCH; GERALD MARTIN; JAMES McFARLAND; STEWARD J. MITCHELL; MICHAEL MOLLOY; MICHAEL O'DONNELL; CHARLES PARKER; JOHN PARKER; JOHN PHILLIPS; BILL PIERSON; JIM RACK; TERRY RETTBERG; GENE ROBERTS; JOE RUSSELL; JOE SARGENT; ROBERT SCHIBI; CHARLES SIBCY; EDWARD SMITH; GEORGE TOFT, JR.; ELSWORTH TRADER; CHARLES VEDDERN; CARL WEBBER; RONALD WHEELER; ANDREW WHITAKER; KEITH WILSON; AND EWELL WYATT,

Plaintiffs-Appellants,

vs.

ORDER

LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN & HELPERS OF AMERICA; CLYDE W. WOEBER; IRVIN T. SCHARFENBERGER; READING CENTRAL MIXED CONCRETE; READING CONCRETE INC.; JOHN DOE (A CORPORATION); JOHN DOE (A BUSINESS ENTITY OR ENTITIES); JOHN DOE (AN INDIVIDUALLY/INDIVIDUALS),

Defendants-Appellees.

BEFORE: MARTIN, WELLFORD and MILBURN, Circuit Judges

These Ohio plaintiffs move this Court to stay its proceedings and remand this cause to the district court for the limited purpose of allowing the district court to hold an evidentiary hearing on their Rule 60(b) motion to vacate the district court's judgment so plaintiffs can amend their complaint to allege a new cause of action. The plaintiffs are appealing from a district court judgment dismissing their suit filed under § 301 for the Labor Management Relations Act, 29 U.S.C. § 185, for being untimely. Charging their former company with breach of contract, and their union with breach of its duty of fair representation, plaintiffs alleged that they were illegally discharged by their employer, Reading Concrete, when it sold its assets to the defendants, SDI Reading Concrete, Inc. and Irvin T. Scharfenberger (collectively referred to as "SDI").

Ultimately, the district court decided that plaintiffs' suit was filed beyond the six month time period applicable to hybrid § 301 suits. *DelCostello v. Teamsters,* 462 U.S. 151 (1983). For this ruling, the court chiefly relied on the deposition and affidavit of a Mr. Donald Browning, who is a plaintiff in this suit and the former union steward for the Reading Concrete drivers. The district court concluded from a review of Mr. Browning's testimony that the plaintiffs certainly knew or should have known by February of 1981 that the union was ignoring their grievances filed on January 12 and 13, 1981, and that the union was acting with hostility and in contravention of the desires of these plaintiffs. With the complaint having been filed more than six months later on November 16, 1981, the court concluded that the suit was late and that the time had not otherwise been tolled while the plaintiffs sought relief through an appellate stage with the NLRB.

On appeal, the plaintiffs complain that if the district court had liberally construed the summary judgment proceedings in their favor, then it would have concluded that the plaintiffs could not have reasonably known that the union had breached their duty of fair representation until the first week of June when they learned that they had lost their appeal before the NLRB. Plaintiffs further contend that they received mixed signals from several union representatives which reasonably led them to believe that they were receiving fair representation by the union up until the first week in June of 1981.

Upon consideration of all of the arguments made by the parties in their briefs and papers filed in this cause, this Court concludes that the district court's judgment of dismissal should be affirmed and that the plaintiffs' motion to stay and remand should be denied. The district court properly concluded that the plaintiffs' suit was untimely because their cause of action had accrued more than six months prior to the filing of the suit when they knew or should have known in late January or early February that their discharge and loss of rights would not be fairly challenged by their union. *Shapiro v. Cook United, Inc.,* F.2d , slip op. 83-3087 (6th Cir. May 17, 1985) *(per curiam).* A review of the testimony given by the plaintiffs' former union steward as submitted in his deposition and his affidavit amply reveals an open hostility and unwillingness on the part of the union president in late January and early February of 1981 to have anything to do with the plaintiffs' grievances. This evidence of open hostility toward the plaintiffs was not assuaged or contradicted by other remarks made by the union's business agent and by the plaintiffs' false hope of success before the NLRB. Although the business agent told Mr. Browning that the union would address the grievances after the legality of the sale was resolved, he also said that his hands were tied and that he could do nothing for the plaintiffs unless he received authorization from the union

president. Plaintiffs certainly could not reasonably have invested any hope of fair representation on the remarks made by the business agent, however, because the union president had already unequivocally expressed his opposition to the plaintiffs' grievances. It was also not reasonable for the plaintiffs to ignore this expression of hostile opposition and to believe that the union had not breached their duty of fair representation because it had reluctantly allowed outside counsel to file a charge of unfair labor practice with the NLRB in behalf of the plaintiffs. The plaintiffs can also not demonstrate reasonable expectation of fair union representation under these circumstances by further relying on cases which supposedly hold that withdrawal of union legal representation during the pursuit of grievance procedures can amount to unfair representation. It is, nonetheless, well-settled that pursuit of relief with the NLRB does not toll the time to file a hybrid § 301 suit. *Aarsvold v. Greyhound Lines, Inc.*, 724 F.2d 72, 73 (8th Cir. 1983) *(per curiam), cert. denied,* U.S. , 104 S.Ct. 3538 (1984); *Estades v. Harry Stevens, Inc.*, 593 F.Supp. 778,782 (D. P.R. 1984); *Bey v. Williams*, 590 F.Supp. 1150, 1154 (W.D. Pa. 1984); *Boyd v. Teamsters Local*, 553, 589 F.Supp. 794, 796 (S.D. N.Y. 1984).

Under these circumstances, it is clear that the plaintiffs' suit was untimely because their cause of action had accrued more than six months prior to the filing of their suit on November 16, 1981, when they knew or reasonably should have known in late January or early February of 1981 that the union would never fairly present their grievances to their previous employer.

Finally, it is concluded that plaintiffs' motion to stay and remand should be denied for several reasons. It is initially observed that a dismissal of a suit for being barred by a statute of limitations may be a judgement on the merits to which *res judicata* can attach. *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981); *Cemer v. Marathon Oil Co.*, 583 F.2d 831, 832 (6th Cir. 1978) *(per curiam).* The plaintiffs may,

however, present their same equitable arguments which are asserted to support their Rule 60 (b) motion to support an argument, to be made in the district court having jurisdiction over their second suit, whether invocation of *res judicata* would contravene an overriding public policy or result in manifest injustice. *See Westwood Chemical Co., Inc. v. Kulick,* 656 F.2d 1224, 1228-31 (6th Cir. 1981), and cases cited therein. We deny the plaintiffs' motion to stay and remand to avoid the anomaly of having the parties' dispute be pending before an appellate court and two district court judges simultaneously.

For these reasons, this panel unanimously agrees that oral argument is not necessary in this appeal. Rule 34(a), Federal Rules of Appellate Procedure. The plaintiffs' motion is accordingly, denied and the district court's judgement is hereby affirmed pursuant to Rule 9(d)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

_____

Clerk

(3)

No. 85-628

Supreme Court, U.S.
FILED
NOV 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

KENNETH P. BIPPUS, et al.,
Petitioners,

vs.

LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,
Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SDI READING CONCRETE, INC. AND IRVIN T. SCHARFENBERGER

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No. 85-628

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

KENNETH P. BIPPUS, et al.,
Petitioners,

vs.

LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SDI READING CONCRETE, INC. AND IRVIN T. SCHARFENBERGER

STATUTES INVOLVED

In addition to those listed in the petition, Ohio Rev. Code Ann. § 2711.13 (Page 1981) may be involved. It is reproduced in the appendix at p. 59a.

STATEMENT OF THE CASE

This is a hybrid fair representation/Section 301 (of the Labor Management Relations Act, 29 U.S.C. § 185)

suit. It grows out of the sale by respondent Reading Central Mixed Concrete, Inc. ("Reading") of its business to respondent SDI Reading Concrete, Inc. ("SDI")[1] in January, 1981. The petitioners are former employees of Reading who were not hired by SDI. Respondent Teamster Local 100 (the "Union") was the bargaining representative for Reading's employees. Petitioners' claim against SDI and respondent Scharfenberger is based solely on their theory that SDI is the alter ego of Reading, and that SDI therefore violated Reading's collective bargaining agreement with the Union by "discharging" petitioners after it purchased Reading's business in January, 1981.[2] (A.16-18.)

The following facts, as stated in the District Court's opinion, are from the affidavit and deposition of petitioner Donald Browning. Browning was the union

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[1] The petition refers to this respondent as Reading Concrete, Inc. Its correct name is SDI Reading Concrete, Inc. SDI Reading Concrete, Inc. is a wholly owned subsidiary of SDI Industries, Inc., which is wholly owned by respondent Scharfenberger. Sup. Ct. R. 28.1.

[2] The facts regarding the sale are set forth in detail in affidavits that SDI filed with the District Court. Briefly, those facts are as follows.

In the fall of 1980, Reading was facing financial disaster. It sold its business to SDI, in a typical arms-length transaction for the sale of a depressed business. In 1981, SDI hired the best Reading employees and granted recognition to and negotiated a collective bargaining agreement with the Union.

In February, 1981, the Union filed an unfair labor practice charge with the NLRB claiming that SDI was bound by the Reading contracts as Reading's alter ego. The NLRB investigated and rejected the claim. The Union also filed a charge claiming that SDI's hiring practices were unlawful. This too the NLRB rejected.

The Union reneged on the agreement, and in March, 1981, the NLRB issued a complaint to enforce the agreement. In December, 1981, under an NLRB approved settlement agreement, the Union signed the contract that it negotiated with SDI.

steward for the Reading drivers. He filed the only grievances pertaining to petitioners' allegedly unlawful discharges and participated in the hiring of an attorney to file this lawsuit. (A.31-39.)

In preparation for the sale of its business to SDI, Reading laid off its employees effective the last working day of 1980 (A.31). On January 12 and 13, 1981, Browning filed grievances protesting the supposedly unlawful discharge of Reading employees (A.31).[3] Browning took the grievances to SDI supervisors (A.32). He told them that the discharges were unfair and that he was filing these grievances on behalf of the men he represented. Browning then took a copy of the grievances to Union president Gairald Kiser and Union business agent Ken Watson. (A.32.)

In response to the grievances, Kiser told Browning that Reading employees were "nothing but a burr under his saddle" and that "he'll be glad when [they] are all gone" (A.33). Also in January, Kiser told Browning that

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[3] The grievance and arbitration provision of the Reading drivers' agreement states in pertinent part as follows:

> (a) . . . [I]n the case of a grievance of an unjust discharge, the said grievant must file his grievance in writing within seventy-two (72) hours after the discharge. . . . In the event said grievances are not filed as herein provided, said discharge shall not be subject to arbitration.
>
> (b) The steward shall bring the grievance to the attention of a supervisor as promptly as circumstances permit.
>
> (c) If the steward and supervisor are unable to settle the matter it shall be referred to the Union and the Employer within twenty-four (24) hours.
>
> (d) The Union and the Employer shall meet within two (2) days, unless circumstances prohibit, or as soon thereafter as is possible, but in any event, they must meet within seven (7) days.

he was going to keep out of Reading's business and that "he would do nothing concerning Reading's grievances and he would not spend any more union money on [those] grievances" (A.33-34).

At a union meeting in January, 1981, Kiser and Browning had a disagreement. After that, Browning could not get any further response from Kiser. When Browning attempted to work through Watson, Watson said that he could not do anything without Kiser's authorization. (A.32-33.)

In late January, 1981, the Union lawyer, Bruce Pence, met with the Reading employees and told them that he could not do anything more for them (A.34). By late January or early February, 1981, Browning and the other petitioners had given up on their grievances. At that time, according to Browning, "as a group we decided that we needed to go on another route." (A.34-35.)

On November 16, 1981, petitioners filed this lawsuit, some nine months after they realized that the Union would not process their grievances. On September 30, 1983, SDI and Scharfenberger filed a motion for summary judgment on the ground that petitioners' claims were barred by the six-month statute of limitations set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), in accordance with *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983). The other respondents filed similar motions. (A.14-15, 23, 39.) Petitioners agreed that six months was the applicable limitations period (A.25-26). The District Court granted respondents' motions, and the Court of Appeals affirmed (A.12, 49).

REASONS FOR DENYING THE WRIT

I. There Is No Reason For The Court To Consider Whether Filing An Unfair Labor Practice Charge With The NLRB Tolls The Statute Of Limitations For A Hybrid Section 301/Breach Of The Duty Of Fair Representation Suit.

A. There Is No Conflict Among The Circuits.

Every lower federal court to consider the question since *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983), has held that the filing of an unfair labor practice charge with the NLRB does not toll the six-month limitations period for a hybrid Section 301/fair representation suit. In addition to the Sixth Circuit in this case and in *Adkins* v. *International Union of Electrical, Radio & Machine Workers*, 769 F.2d 330, 335-36 (6th Cir. 1985), the Fourth and the Eighth Circuits have so held. *Kolomick* v. *United Steelworkers of America, District 8*, 762 F.2d 354, 355-57 (4th Cir. 1985); *Aarsvold* v. *Greyhound Lines, Inc.*, 724 F.2d 72, 73 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 3538 (1984). *See also*, *Martin* v. *Adams Distribution Services, Inc.*, 114 L.R.R.M. (BNA) 3562, 3564-66 (W.D. Mo. 1983). District courts in the First, Second, Third, Fifth and Ninth Circuits have held that there is no tolling. *Estades* v. *Harry M. Stevens, Inc.*, 593 F. Supp. 778, 782-83 (D.P.R. 1984); *Boyd* v. *Teamsters Local Union 553*, 589 F. Supp. 794, 796-97 (S.D.N.Y. 1984); *Bedat* v. *McLean Trucking Co.*, 119 L.R.R.M. (BNA) 2945, 2946-47 (D. Conn. 1984); *Nicely* v. *United States Steel Corporation*, 574 F. Supp. 184, 187-88 (W.D. Pa. 1983); *Bey* v. *Williams*, 590 F. Supp. 1150, 1154 (W.D. Pa. 1984); *Weed* v. *East Texas Motor Freight Lines, Inc.*, 592 F. Supp. 713, 718-19 (N.D. Tex. 1983); *Glover* v. *United Grocers, Inc.*, 115

L.R.R.M. (BNA) 2441, 2442 (D. Ore. 1983), *aff'd*, 746 F.2d 1380 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2357 (1985).

The Ninth Circuit cases on which petitioners rely do not support a contrary conclusion. *Retail Clerks Union Local 648* v. *Hub Pharmacy, Inc.*, 707 F.2d 1030 (9th Cir. 1983), was decided before *DelCostello*, applied state tolling law, did not involve a hybrid Section 301/fair representation suit, and, as petitioners acknowledge (petition, p. 15), has no application here. *Aragon* v. *Federated Department Stores, Inc.*, 750 F.2d 1447 (9th Cir. 1985), the case on which petitioners principally rely to support a conflict, did not hold that filing an unfair labor practice charge tolls the limitations period. In fact, no NLRB charge had been filed in that case, and the court declined to decide the issue. *Id.* at 1454. Significantly, in *Glover* v. *United Grocers, Inc.*, 115 L.R.R.M. (BNA) 2441, 2442 (D. Ore. 1983), *aff'd*, 746 F.2d 1380 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2357 (1985), the District Court in the Ninth Circuit held, consistent with the other courts, that filing an NLRB charge does not toll the limitations period. There is no conflict here.

B. This Court Already Has Conclusively Decided The Principles That Control Petitioners' Tolling Question.

This Court's decisions in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), *International Union of Electrical, Radio & Machine Workers, Local 790* v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976), and *Vaca* v. *Sipes*, 386 U.S. 171 (1967), foreclose petitioners' tolling argument and establish that the Court of Appeals correctly decided this issue. Accordingly, there is no sufficient reason to review it.

Johnson and *Robbins & Meyers* establish that pursuit of agency proceedings does not toll the limitations period for a court suit where the two proceedings provide independent (although related) avenues of relief and pursuing the agency proceedings is not a prerequisite to filing the court action. In *Johnson*, the Court held that the statute of limitations for a 42 U.S.C. § 1981 action is not tolled while a Title VII (of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*) charge is pending before the EEOC. In *Robbins & Meyers*, the Court held that pursuing the grievance procedure under a collective bargaining agreement does not toll the period for filing a charge with the EEOC under Title VII.

In *Vaca*, the Court held that a fair representation suit is independent of NLRB unfair labor practice proceedings. *Vaca* establishes that a fair representation suit and an NLRB charge are separate avenues of relief and filing an NLRB charge is not a prerequisite to filing a lawsuit. Accordingly, *Johnson*, *Robbins & Meyers*, and *Vaca* together establish that the limitations period in a hybrid Section 301/fair representation suit is not tolled during NLRB proceedings.

Moreover, this Court has consistently held that there is a strong federal policy favoring the prompt resolution of labor disputes. *See, e.g., United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 63-64 (1981). Petitioners' tolling argument, if accepted, would violate this policy by unreasonably protracting labor disputes. When the NLRB issues a complaint, no enforceable decision results until after a hearing before an Administrative Law Judge, the adoption of the Judge's recommended decision by the NLRB, and an order by the Court of Appeals enforcing the NLRB's decision. This process can take many years.

There is no reason to review petitioners' tolling question.[4]

II. The Court Should Not Consider In This Case Whether *DelCostello* Should Be Applied Retroactively Because This Issue Was Not Raised Below. Moreover, Applying *DelCostello* Prospectively Would Not Change The Judgment Because A Shorter Limitations Period Would Be Applicable.

The decisions of this Court establish that it does not decide questions not raised or resolved in the lower courts, except in exceptional cases presenting exceptional circumstances. *Lawn* v. *United States*, 355 U.S. 339,

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[4] Also, this would not be an appropriate case to apply equitable tolling. Petitioner Browning, the union steward, who filed the only grievances pertaining to the petitioners' allegedly unlawful discharges and participated in the decision to hire an attorney to file this lawsuit, had no faith that the NLRB alter ego charge would succeed. Quoting from his deposition:

> Q. And you are aware that his charge [the Union lawyer's NLRB alter ego charge] was dismissed, aren't you?
>
> A. . . . Yes, I'm aware that his was dismissed. I knew they would be dismissed. . . . I knew that when all of this was going on [the pendency of the NLRB charge] that we should have something back there to try to help us, . . . our own private attorney. I knew that we should do that.
>
> Q. And that is what you were talking about in early February, getting the private attorney?
>
> A. Oh, I'm sure that private attorney was mentioned long before that, just to make sure our rights were safeguarded . . . I thought that that should have been all along, that we should have somebody besides the union with us. Because I knew how we had been jacked around.

Thus, petitioners attempt to excuse their untimely complaint by relying on the pendency of an NLRB charge, a charge which, at the time of its filing, they recognized was futile. These facts hardly justify equitable tolling.

362-63 n. 16 (1958); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957). Petitioners did not claim in either the District Court or the Court of Appeals that *DelCostello* should not be applied to this case. This case presents no exceptional circumstances. In fact, in the District Court, petitioners expressly agreed that *DelCostello* is applicable (A.25-26). They said in their memorandum opposing summary judgment that "[t]he Plaintiffs do not oppose Defendants' argument that the six-month Statute of Limitations, as set forth in Section 10(b) of the National Labor Relations Act . . . is controlling in this action pursuant to *DelCostello* [and] Plaintiffs concur with SDI and agree that the *DelCostello* decision should be applied 'retroactively' in this case. . . ."

Moreover, limiting *DelCostello* to prospective application would be of no help to petitioners. If the *DelCostello* six-month limitations period were not applicable to petitioners' claims, their claims would be subject to the three-month Ohio limitations statute for actions to vacate arbitration awards, Ohio Rev. Code Ann. § 2711.13 (Page 1981). In *Lawson* v. *Truck Drivers, Chauffeurs & Helpers, Local Union 100*, 698 F.2d 250 (6th Cir. 1983), *cert. denied sub nom. Leach* v. *United States Postal Service*, 464 U.S. 814 (1983), decided before *DelCostello*, the Sixth Circuit held that Ohio Rev. Code Ann. § 2711.13 applied to a hybrid Section 301/fair representation case which accrued in August, 1978 and was filed in October, 1980. Therefore, no purpose would be served by reviewing whether *DelCostello* should be applied to this case.

III. The District Court's Grant Of Summary Judgment Does Not Present Any Significant Questions That Would Warrant Supreme Court Review.

This Court has conclusively established the standards applicable to summary judgment. There is no reason to grant the petition to restate those standards, especially here, where the District Court, as affirmed by the Court of Appeals, did not depart substantially from those standards, but rather followed them to the letter. The District Court made no credibility determinations and did not weigh conflicting evidence. The District Court granted summary judgment based on the conclusive admissions of petitioners contained in Browning's deposition testimony and affidavit. It properly relied on these facts over which there could be no dispute. *See, First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 271, 285-87 (1968) (summary judgment against plaintiff is proper when it is based on admissions in his deposition testimony and corroborative evidence presented by defendant).

Clearly, the District Court correctly granted summary judgment. There was no dispute that petitioners' claims could only arise from the Union's refusal to take Browning's January 12 and 13, 1981 grievances to arbitration. That is the only breach of the duty of fair representation that would permit petitioners to sue SDI and Reading in federal court instead of pursuing their claims through arbitration. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). The record before the District Court established beyond any factual dispute that, by late January or early February, 1981, petitioners knew or reasonably should have known

that the Union would not pursue the grievances.[5] Browning's deposition testimony demonstrates this:

> Q. So sometime approximately in January of '81 Kiser told you that he would do nothing concerning Reading's grievances. And he was referring to both the old grievances and the grievance that you had filed protesting the sale of the business, is that correct?
>
> A. Yes sir; the old and the new grievances.
>
> Q. . . . . Now, was it approximately this time, approximately January of 1981, after Kiser made those statements, that you decided you needed your own lawyer?
>
> A. As a group we decided that we needed to go on another route.
>
> Q. And why was that?
>
> A. Well, from the statements that was made from the union.

Browning testified unequivocally that, in January, 1981, Union president Kiser told him that he would do nothing more concerning the grievances. Kiser's affidavit testimony, which petitioners never disputed, confirmed this: "In late January, 1981 I informed Browning that the Union would not process these grievances further."

Therefore, petitioners' admissions, corroborated by other undisputed evidence, established that petitioners' claims accrued in late January or early February, 1981.

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[5] Petitioners do not dispute that this is the proper standard for determining when a cause of action accrues for statute of limitations purposes.

Petitioners agreed that six months is the applicable statute of limitations (A.25-26). Since this lawsuit was not filed until November, 1981, the District Court correctly granted respondents' motions for summary judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 13, 1985.

APPENDIX

Ohio Rev. Code Ann. § 2711.13 (Page 1981) provides as follows:

> After an award in an arbitration proceeding is made, any party to the arbitration may file a motion in the court of common pleas for an order vacating, modifying, or correcting the award as prescribed in sections 2711.10 and 2711.11 of the Revised Code.
>
> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered to the parties in interest, as prescribed by law for service of notice of a motion in an action. For the purposes of the motion, any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Supreme Court, U.S.
FILED
NOV 15 1985
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CLERK

No. 85-628 (4)

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Respondents.

On A Petition For A Writ Of Certiorari To The United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the six month statute of limitations held applicable to § 301 fair representation/breach of contract suits in *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S 151 (1983), should be applied retroactively to cases pending when *DelCostello* was decided.

2. Whether the pendency before the National Labor Relations Board of an unfair labor practice charge tolls the running of the six month statute of limitations held applicable to § 301 fair representation/breach of contract suits n *DelCostello* v. *International Brotherhood of Teamsters.*

3. Whether the District Court below properly granted the motions of respondents for summary judgment on the basis of the applicable statute of limitations, where the record, read in light most favorable to petitioners, establishes that there is no genuine issue as to any material fact.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Both the opinion of the District Court for the Southern District of Ohio, and the opinion of the Court of Appeals for the Sixth Circuit are unreported. Copies of these opinions are included in the Appendix to the Petition.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 17, 1985. A copy thereof is included in the Appendix of the Petition, which was filed on October 11, 1985, and invokes the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

STATUTES AND RULES INVOLVED

The Petition relies on the following:

1. Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185.

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(F)(1).

3. Ohio Revised Code §§ 2305.07; 2305.09; 2305.10.

4. Rule 56(c) of the Federal Rules of Civil Procedure. The text of these statutes and rules are included in the Appendix to the Petition.

COUNTERSTATEMENT OF THE CASE

Petitioners are former employees of Respondent Reading Central Mixed Concrete (hereinafter "Reading") who on November 16, 1981 filed an action in the District Court below alleging breach of the collective bargaining agreement by their former employer and breach of the duty of fair representation by Respondent Local 100 of the International Brotherhood of Teamsters (hereinafter "Local 100"), their Union. This "hybrid" fair representation/breach of contract suit was brought under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185.

On January 2, 1981 Reading sold its assets to Respondent Reading Concrete, Inc., a subsidiary of SDI Industries, Inc. (hereinafter "SDI"). The Petitioners had been laid off by Reading on the last working day of 1980 and were not rehired by SDI after its acquisition of Reading's business.

Petitioners claimed in the Courts below that Article 16 of the collective bargaining agreement between Reading and Local 100 required any purchaser of Reading's business to assume the existing labor contract. Petitioners alleged that Reading violated that agreement by entering into a purchase agreement with SDI which did not require SDI to assume the contract and that Local 100 violated its duty of fair representation by failing to take action to enforce Article 16 of the contract. Petitioners specifically alleged that Local 100 acted in an arbitrary, discriminatory and bad faith manner towards the Petitioners when it refused to process grievances filed against Reading under Article 16 following their layoff.

On January 12 and 13, 1981, Petitioner Donald Browning, the Union steward at Reading, filed the grievances protesting the allegedly improper discharge of certain former Reading employees following the transfer of the business to Respondent SDI. After delivering copies of these grievances to SDI, Browning took copies to Union President Gairald Kiser and Business Agent Kenneth Watson. As it was Kiser's belief that the collective bargaining contract with Reading did not require assumption of the union contract by a buyer of the business, he told Browning during conversations in January that he was going to keep out of Reading's business and that "he would do nothing concerning Reading's grievances and he would not spend any more union money on [those] grievances". Watson also told

Browning that nothing further could be done without Kiser's authorization.

Although Local 100 refused to initiate the contractual grievance procedure on behalf of Petitioners, the Union did provide them with an attorney to process an unfair labor practice charge before the NLRB. The Petitioners appeal to the NLRB General Counsel was ultimately denied.

On November 16, 1981, Petitioners filed the instant lawsuit, some nine months after they realized that the Union would not process their contractual grievances. On January 10, 1984, said action was dismissed by the district court, Honorable Timothy S. Hogan presiding, on the grounds that, drawing all inferences in a light most favorable to Petitioners, there was no genuine issue of material fact as to when the Petitioner's cause of action arose; and that because said cause of action had accrued no later than early February, 1981, the action was barred by the six month statute of limitations held applicable by this Court in *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1981). The district court also held that pendency of unfair labor practice charges before the NLRB did not toll the running of said statute of limitations. The Court of Appeals affirmed the district court's judgment on July 17, 1985.

ARGUMENT FOR DENYING THE PETITION

III. DELCOSTELLO HAS NOT BEEN LIMITED TO PROSPECTIVE APPLICATION.

Petitioners argue that a conflict exists between the cir cuit courts of appeal concerning the retroactive application of *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Because certiorari is denied absent "principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal," *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393 (1923), careful scrutiny by this Court of the alleged conflict among the circuits is warranted.

Contrary to the contention of Petitioners, there is little variance among the courts of appeals as to the proper application of *DelCostello* to cases arising prior to the date of that decision, June 8, 1983. Opinion on this issue in the circuits is almost uniform. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have all held that *DelCostello* should be given retroactive effect. *See Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2d Cir. 1984); *Perez* v. *Dana Corp., Parish Frame Div.*, 718 F.2d 581 (3d Cir. 1983); *Murray* v. *Branch Motor Express Corp.*, 723 F.2d 1146 (4th Cir. 1983); *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984); *Storck* v. *International Brotherhood of Teamsters, Etc.*, 712 F.2d 1194 (7th Cir. 1983); *Lincoln* v. *District 9 of Intern. Ass'n of Machinists*, 723 F.2d 627 (8th Cir. 1983);

Barnett v. *United Airlines, Inc.*, 738 F.2d 358 (1984); *Hand* v. *International Chemical Workers Union*, 712 F.2d 1350 (11th Cir. 1983). Nearly all of the reported district court decisions have applied *DelCostello* retroactively as well.

Thus, the Ninth Circuit stands virtually alone in finding that *DelCostello* should not always be applied retroactively. *Barina* v. *Gulf Trading & Transportation Co.*, 726 F.2d 560 (1984), and *Edwards* v. *Teamsters Local No. 36*, 719 F.2d 1036 (1983). Even the Ninth Circuit, however, applies the case retroactively when its effect does not shorten, but lengthens, the time in which a plaintiff may file a "hybrid" action under § 301. *See Glover* v. *United Grocers, Inc.*, 746 F.2d 1380 (9th Cir. 1984).

In the aforementioned cases the Ninth Circuit has applied the guidelines set forth by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) to decide whether or not *DelCostello* should be given retroactive effect. The factors specified in *Chevron* are: (1) whether the decision establishes a new principle of law; (2) whether retroactive application will further or retard the purposes of the rule in question and (3) whether applying the new decision will produce substantial inequitable results. In *Barina* the Ninth Circuit, while refusing to apply *DelCostello* retroactively, conceded that the second *Chevron* factor favors retroactive application of the case, stating: "A substantial purpose behind the six-month limitation developed in *DelCostello* is to give finality to labor disputes." 726 F.2d at 564. It is well established that, because of the strong presumption in favor of retroactivity in cases such as this, all three *Chevron* factors must mitigate against retroactivity before courts will give a case prospective only effect. *See*

Rogers v. *Lockheed-Georgia Co.*, 720 F.2d 1247, 1249 (11th Cir. 1983), *cert. denied*, __ U.S. __, 105 S. Ct. 292 (1984); *Holzsager* v. *Valley Hospital*, 646 F.2d 792, 797 (2d Cir. 1981); *Harpp* v. *General Electric Co.*, 571 F. Supp. 426, 432 (N.D. N.Y. 1983); *accord*, *Kremer* v. *Chemical Construction Corp.*, 623 F.2d 786, 789-90 (2d Cir. 1980), *aff'd.* 456 U.S. 461 (1982). Moreover, several courts have performed their own analysis under the *Chevron* guidelines and found *DelCostello* to have retroactive effect. *See Graves*, 736 F.2d at 821-22; *Landahl* v. *PPG Industries*, 746 F.2d 1312, 1315 (7th Cir. 1984); *Edwards*, 720 F.2d at 862; *Lincoln*, 723 F.2d at 630; *Murray*, 723 F.2d at 1140; *Perez*, 718 F.2d at 508; and *Rogers*, 720 F.2d at 1250.

A conflict between the circuit courts of appeal warranting a grant of certiorari should be premised upon irreconcilable holdings. Such a conflict is not presented here, as the decision of the court below represents the overwhelming majority, as well as correct, view on the retroactivity of the *DelCostello* issue. Petitioners have not shown a clear and substantial conflict on this issue. It is also clear that at this time the issue is not likely to recur in many cases, where a § 301 cause of action arose before the date of the *DelCostello* decision.

Finally, it should be noted that Petitioners had not, until the instant petition, contended that *DelCostello* should only be applied prospectively. In their brief to the Court of Appeals below, Petitioners "concede[d] that the correct limitations period to apply in a hybrid § 301/fair representation action is the six month limitations period in § 10(b) of the NLRA, as held by the United States Supreme Court in *DelCostello* . . ." Thus, because the Petitioners until now had not raised, and the Court below did not consider, the issue of retroactive ap-

plication of *DelCostello*, this case is a poor choice for disposition of the alleged conflict therein.

II. THE PENDENCY OF AN UNFAIR LABOR PRACTICE CHARGE BEFORE THE NLRB DOES NOT TOLL THE APPLICABLE STATUTE OF LIMITATIONS.

Petitioners contend that pursuit of relief before the National Labor Relations Board should toll the running of the applicable statute of limitations. Petitioners also contend that the decision below conflicts with other court of appeals decisions as to the tolling of the statute of limitations.

Numerous federal courts have considered this same issue, and virtually every decision is in accord with the ruling below that the pendency of an unfair labor practice charge before the NLRB does not act to toll the running of the six month statute of limitations for filing a § 301 suit for fair representation/breach of contract. *See Kolomick* v. *United Steelworkers of America, District 8*, 762 F.2d 354 (4th Cir. 1985) ("[a] rule tolling the time period within which to file a § 301 claim in federal court simply by virtue of filing a claim with the NLRB would be contrary to the rationale underlying *DelCostello* and would not effectuate congressional goals." 762 F.2d at 356); *Bedat* v. *McLean Trucking Co.*, 119 LRRM 2945 (D.C. Conn. 1984) ("[w]here two such distinct avenues for potentially quite different relief do exist, a plaintiff's pursuit of one need not and should not toll the limitations period for pursuit of the other." 119 LRRM at 2947); *Bey* v. *Williams*, 590 F. Supp. 1150 (W.D. Pa. 1984); *Martin* v. *Adams Distribution Services*, 114 LRRM 3562 (W.D. Mo. 1983) ("[a] decision not to toll is

also supported by Congress' desire, as evidenced by section 10(b) to ensure finality of private settlements of employer-employee conflicts within a relatively short period of time." 114 LRRM at 3566); *Weed* v. *East Texas Motor Freight Lines, Inc.*, 592 F. Supp. 713 (N.D. Tex. 1983); *Association of Frigidaire Model Makers* v. *General Motors Corp.*, 573 F. Supp. 236 (S.D. Ohio 1983).

The determination of the aforementioned courts that a hybrid § 301 action is entirely independent of any and all NLRB proceedings and that such NLRB proceedings do not toll the statute of limitations for the § 301 claim is largely based on this Court's decision in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1979). In *Johnson* this Court held that the timely filing of a charge with the Equal Employment Opportunity Commission pursuant to § 706 of Title 7 of the Civil Rights Act of 1964 did not toll the running of the applicable statute of limitations to the action, which was brought under Title 42 U.S.C. § 1981. This Court held that because the two potential remedies involved under these statutes were "truly independent . . . [there is] no policy reason that excuses [plaintiff's] failure to take the minimal steps necessary to preserve each claim independently". *Johnson, supra*, 421 U.S. at 465-466. *Accord, Electrical Workers IUE Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Corson* v. *First Jersey Securities, Inc.*, 537 F. Supp. 1263, 1267-68 (D. N.J. 1982). This reasoning is entirely applicable to the instant case.

The only post-*DelCostello* decision cited by the Petitioners in support of their position is *Aragon* v. *Federated Department Stores, Inc.*, 750 F.2d 1447 (9th

Cir. 1983), *cert. denied* __ U.S. __, 120 LRRM 2728 (1985). As with the issue of the retroactivity of *DelCostello*, the Ninth Circuit stands alone in its view of the principles governing the tolling of the statute of limitations in hybrid § 301 cases. The *Aragon* decision ignores the important federal policy of prompt resolution of labor disputes enunciated in *DelCostello*, 452 U.S. at 168. *Accord*, *Kolomick*, 762 F.2d at 357; *Lincoln*, 723 F.2d at 630; *Rogers*, 720 F.2d at 1150; *Perez*, 718 F.2d at 588.

The decision of the Court below clearly represents the overwhelming majority, as well as correct, view on the issue of tolling the applicable statute of limitations. Petitioners cannot show a clear and substantial conflict on this issue requiring resolution by this Court.

III. THE DISTRICT COURT BELOW PROPERLY CONCLUDED THAT THERE WAS NO GENUINE ISSUE AS TO ANY FACT MATERIAL TO THE DETERMINATION OF THE ACCRUAL OF PETITIONERS' CAUSE OF ACTION.

Petitioners argue that the District Court below, in examining a "sparce" and "mixed" record, failed to adhere to the proper legal standard in granting the Respondents' motion for summary judgment. Specifically, Petitioners contend that there is a genuine issue of material fact as to when their cause of action accrued. The record, however, does not support Petitioners' contention that they were entitled to any inferences which cast doubt upon the time that Petitioners "knew or reasonably should have known that a breach of the duty of fair representation had occurred". *Adkins* v. *General Motors Corp.*, 573 F. Supp. 1188, 1192 (S.D. Ohio 1983). *Ac-*

cord, *Metz* v. *Tootsie Roll Industries, Inc.*, 715 F.2d 299, 303-04 (7th Cir. 1983), *cert. denied*, __ U.S. __, 104 S. Ct. 976 (1984); *Santos* v. *District Council of New York City, Etc.*, 619 F.2d 963, 969 (2d Cir. 1980).

Statements made by Petitioner Browning in his deposition establish beyond doubt that by late January, 1981, he knew that the grievances he filed on behalf of the Petitioners would not be pursued. Browning's statements also make clear that at that time the Petitioners decided they needed to pursue other avenues to safeguard their rights. Moreover, Browning stated that after certain conversations with Kiser in January, 1981, Kiser would not even see him to discuss the grievances. Clearly, by February of 1981 Browning and the other Petitioners were well aware that Local 100 was not going to process their grievances. It was at this time that the Petitioners' action for breach of the duty of fair representation accrued. As such, Petitioners claim is now barred by the applicable six month statute of limitations.

Petitioners argue that the retainment of counsel by Local 100 to allow Petitioners to pursue relief before the NLRB indicated to Petitioners that satisfaction could ultimately be attained through the contractual grievance procedure. However, as Judge Hogan in the District Court below correctly concluded, this position does not help Petitioners. "The fact that the union reluctantly offered to permit a union hired attorney to pursue an independent remedy offers no support to plaintiffs' case. Regardless of [the attorney's] actions before the NLRB, the plaintiffs knew or should have known by early February, 1981 that nothing would be done on their contractual grievances. Therefore, the breach occurred at that time." (Order, p. 11, n.2).

It is clear, that the District Court did view the evidence giving all possible favorable inferences to Petitioners to which they were entitled, and properly concluded that, by early February, 1981, Petitioners knew or should have known that any claim of breach of the duty of fair representation they had against Local 100 had arisen.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of Certiorari.

Respectfully submitted,

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